

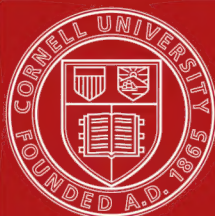
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# NEW COMMENTARIES

ON

## MARRIAGE, DIVORCE, AND SEPARATION

AS TO

THE LAW, EVIDENCE, PLEADING, PRACTICE, FORMS  
AND THE EVIDENCE OF MARRIAGE  
IN ALL ISSUES

ON

A NEW SYSTEM OF LEGAL EXPOSITION

BY

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IN TWO VOLUMES

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# MARRIAGE, DIVORCE, AND SEPARATION.

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## BOOK VIII.

### THE JUDICIAL LOCALITY FOR MATRIMONIAL SUITS, INCLUDING THE CONFLICT OF DIVORCE LAWS.

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#### CHAPTER I.

##### THE JURISDICTIONAL DISTINCTIONS AND THEIR RESULTINGS IN DIVERSE RULES.

- § 1-3. Introduction.
- 4-13. By International Law or Statutes, distinguished.
- 14-24. Marriage Status or Incidents, — *in Rem* or *in Personam*.
- 25-27. Jurisdiction over One Party, or over Both.
- 28-39. Synopsis of Resulting Rules.
- 40. Doctrine of Chapter restated.

§ 1. **In General of Legal Distinctions.** — Only unthinking persons look upon the distinctions in our law as superfluous refinements. It is possible to draw a frivolous or unjust distinction, and such may occasionally be discovered in the opinion of a court, but the true ones are of the fundamentals in legal justice. Human affairs are alike multitudinous and complicated, therefore legal rules must be varied with the cases to which they are to be applied.

§ 2. **Importance in Matrimonial Law.** — The distinctions peculiar to the matrimonial law are special also in their importance. For example, we saw in the first volume that the mixing, in the minds of judges and legal authors, of the marriage contract, the marriage status, and the matrimonial rights of property, things in their natures dissimilar and governed by different rules, has wrought in our books a confusion greatly detrimental to the administration of the law. It is the same also with the various

things to be considered in the present division of this second volume. Let us, therefore, begin by endeavoring in this chapter to clear our mental vision, and to set before it the true jurisdictional distinctions and their consequences. Thus,—

§ 3. **How Chapter divided.**—We shall consider, I. The Distinction between the Jurisdictions by International Law and by Statutory Command; II. The Distinction between the Jurisdictions over the Marriage Status, or *in Rem*, and over its Incidentals, or *in Personam*; III. The Distinction between the Jurisdictions over one of the Married Parties and over both; IV. Synopsis of Resulting Rules.

### I. *The Distinction between the Jurisdictions by International Law and by Statutory Command.*

§ 4. **Jurisdiction Indispensable.**—In every department of our law, a jurisdiction—that is, an authority in the court to take cognizance of the particular case or controversy<sup>1</sup>—is essential to the validity of any proceeding therein. So that what is done without a jurisdiction is a mere nullity.<sup>2</sup> This is the foundation doctrine of the present series of chapters. There can be no valid divorce, nullity decree, or other determination relating to a marriage, without a jurisdiction in the tribunal. Thereupon,—

§ 5. **Two Sources.**—To render a matrimonial sentence of any sort effective anywhere or for any purpose, the statute or other law of the State wherein the court sits must confer on it a jurisdiction comprehending the case.<sup>3</sup> Added to which, to entitle its sentence to extra-territorial recognition, the jurisdiction must satisfy also the international rules. So that, since marriage is a creation equally of the municipal law and of the law of nations,<sup>4</sup> a jurisdiction over it, to dissolve, affirm, or modify it, is complete

<sup>1</sup> U. S. v. Arredondo, 6 Pet. 691.

<sup>2</sup> Elliott v. Peirsol, 1 Pet. 328, 340; Hickey v. Stewart, 3 How. U. S. 750, 762; Williamson v. Berry, 8 How. U. S. 495; Miller v. Brinkerhoff, 4 Denio, 118, 47 Am. D. 242; Buchanan v. Roy, 2 Ohio St. 251, 266; U. S. v. Clarke, 8 Pet. 436, 444; U. S. v. Arredondo, supra, at p. 709; Paine v. Mooreland, 15 Ohio, 435, 45 Am. D. 585; Cochran v. Loring, 17 Ohio, 409, 422; Atkins v. Kinnan, 20 Wend. 241,

32 Am. D. 534; Gaines v. Hennen, 24 How. U. S. 553; Palmer v. Oakley, 2 Doug. Mich. 433, 47 Am. D. 41; Merrill v. Lake, 16 Ohio, 373, 47 Am. D. 377; Owen v. Hurd, 2 T. R. 643, 644.

<sup>3</sup> Alsop v. Jordan, 69 Tex. 300, 5 Am. St. 53, 55; Neff v. Beauchamp, 74 Iowa, 92; Burton v. Burton, 45 Hun, 68; Schooler v. Schooler, 77 Ga. 601.

<sup>4</sup> Vol. I. § 833-838.

in all aspects only when conferred both by the law of the State and by international law<sup>1</sup> Now,—

§ 6. **The Law of Nations** — is the law also of each individual nation, constituting a part of its unwritten domestic law.<sup>2</sup> And it is a part which neither a court nor the legislature has any just right to abrogate; for it binds the entire nation, including all private citizen and governmental functions. Still,—

§ 7. **Precedence of Laws — Statute.** — In the apportionment of the several functions among the different branches of our governments, neither executive nor legislative power is given to the courts. And the legislature, acting within its constitutional sphere, may ordain laws abrogating the unwritten ones, and the judges must obey them. The result whereof is that, however important it is for the domestic rule to coincide with the international, the courts must follow the statute though it gives a jurisdiction either broader or narrower than that of the international law.<sup>3</sup> So that —

§ 8. **Local Jurisdiction contrary to International.** — If a court, under command of its own government, takes a jurisdiction not rightful by the general principles of law as held among civilized nations, its judgment will be binding at home but null abroad.<sup>4</sup> This was explained by Marshall, C. J., in the Supreme Court of the United States, as follows: “Of its own jurisdiction, so far as depends on municipal rules, the court of a foreign nation must judge, and its decision must be respected. But if it exercises a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominion of the prince from whom the authority is derived, they are not regarded by foreign courts. This distinction is taken upon this principle that the law of nations is the law of all tribunals in the society of nations, and is supposed to be

<sup>1</sup> *Cheely v. Clayton*, 110 U. S. 701, 705; *Jones v. Jones*, 108 N. Y. 415; *Cross v. Cross*, 108 N. Y. 628.

<sup>2</sup> Vol. I. § 833, 835, 1068; *Bishop Written Laws*, § 141; 1 *Bishop Crim. Law*, § 124.

<sup>3</sup> Vol. I. § 835; *Bishop Written Laws*, § 11–17, 33, 34.

<sup>4</sup> Consult and compare *Davis v. Smith*, 5 Ga. 274, 48 Am. D. 279; *Pearson v. Darrington*, 32 Ala. 227; *Hickey v. Stewart*, 3 How. U. S. 750; *Stoughton v. Mott*,

13 Vt. 175; *Cheriot v. Foussat*, 3 Binn. 220; *Wyman v. Campbell*, 6 Port. 219, 31 Am. D. 677; *Georgia Rld. and Banking Co. v. Harris*, 5 Ga. 527; *Camden v. Mulford*, 2 Dutcher, 49; *Martin v. Carron*, 2 Dutcher, 228; *Carron v. Martin*, 2 Dutcher, 594, 69 Am. D. 584; U. S. *v. Yates*, 6 How. U. S. 605; *Flowers v. Foreman*, 23 How. U. S. 132; *Wyatt v. Judge*, 7 Port. 37; *Stamps v. Newton*, 3 How. Missis. 34; *Bostwick v. Perkins*, 4 Ga. 47.

equally understood by all.”<sup>1</sup> Applying this doctrine to matrimonial causes, and partly to repeat,—

§ 9. **No International Divorce Jurisdiction.**—When, by command of a statute, a court entertains a divorce or other matrimonial suit, the inference is not inevitable that the tribunals of other States and countries will, or should, hold it to be competent.<sup>2</sup> If there is not also an international jurisdiction, the sentence will be valid at home, but in other countries void.<sup>3</sup> Still,—

§ 10. **Interpretation of Statute.**—In matter of interpretation, the purpose whereof is to ascertain the legislative intent,<sup>4</sup> there is a strong presumption that the legislature did not intend to prescribe to the courts a jurisdictional rule in conflict with international law. Therefore in the absence of express words to the contrary, a jurisdictional statute will be construed in connection with the international rule, and by contraction or expansion of its terms be given a meaning which will not violate it.<sup>5</sup> For example,—

§ 11. **Under General Words of a Statute,**—it has been well laid down, the court will not take jurisdiction to dissolve a marriage between parties not so situated as, within the principles of international law, to render the sentence binding upon the tribunals of every other country or State.<sup>6</sup> On the other hand,—

§ 12. **International Rule presumed same as Statutory.**—Since the legislature is under a high duty not to violate the law of nations, its commands on this question of international law may well be accepted by the courts as expressive of its opinion of what such law permits. Yet it cannot be set down as settled that the judges are under a duty to follow the legislative opinion on this sort of question if they deem it wrong, unless it is put in the imperative form. Indeed, we have authority for saying that they are not.<sup>7</sup> And it is abundantly settled that a foreign sentence will not be rejected simply because the domestic law does not give a like jurisdiction to the domestic tribunal. What is clear as to

<sup>1</sup> *Rose v. Himely*, 4 Cranch, 241, 276, 277.

<sup>2</sup> *Cross v. Cross*, 108 N. Y. 628; *Cole v. Cunningham*, 133 U. S. 107, 112; *Trevino v. Trevino*, 54 Tex. 261.

<sup>3</sup> *Ante*, § 5; *D'Arcy v. Ketchum*, 11 How. U. S. 165.

<sup>4</sup> *Bishop Written Laws*, § 70, 75, 76, 93, 200.

<sup>5</sup> Vol. I. § 835; *Bishop Written Laws*,

§ 88–90, 123, 131–138 *a*, 141. And see observations of Shaw, C. J. in *Harteau v. Harteau*, 14 Pick. 181, 187, 25 Am. D. 372. Also, as explaining and enforcing this doctrine, 1 *Bishop Crim. Law*, § 115, note, particularly par. 9, and the places there referred to.

<sup>6</sup> *Ditson v. Ditson*, 4 R. I. 87.

<sup>7</sup> *Irby v. Wilson*, 1 Dev. & Bat. Eq. 568, 581.



the former proposition is, that the domestic tribunal should lean to sustaining the foreign jurisdiction if a domestic statute would have required it to assume jurisdiction under like circumstances.<sup>1</sup> Thus, —

§ 13. **Instance — Judicial Views.** — It appeared in a Wisconsin case that parties were married in Wisconsin, there they lived together, and there the husband committed a matrimonial offence. Afterward the wife, without him, transferred her residence to Minnesota, in which State she obtained a divorce sentence for this offence, — he not appearing, and having merely the notice by publication which the laws of Minnesota provided for non-resident defendants. Yet the Wisconsin Court accepted this divorce as adequate to change in Wisconsin her matrimonial status. This decision is justified by the pretty generally accepted principles of interstate jurisdiction; but in this instance Cole, J., presented reasons for it in accord with the doctrine we are now considering, as follows: “That decree was rendered by a court of general jurisdiction, and for a cause and under circumstances which would authorize the courts of this State to dissolve the marriage. Mrs. Shafer had her actual, *bona fide* domicil in Minnesota, and had resided there for a year when she applied for a divorce. It seems that she and her husband had lived separate for three years. It is true the marriage was solemnized in this State, and the acts of cruelty complained of were committed in this State; and, moreover, the plaintiff was neither personally served nor appeared in the action in Minnesota, and the court only acquired jurisdiction by publication under the statutes of that State. But notwithstanding all this, we think effect must be given to the decree. For if Mrs. Shafer had been married in Minnesota, and the acts of cruelty complained of had been committed there, still if she had afterward removed to this State and resided here a year, the courts of this State would have had jurisdiction to decree a dissolution of the marriage contract upon her application, although her husband had never been a resident of, or served with process in, this State. . . . It seems but the necessary logical consequence [of some quoted decisions] to affirm the validity of the judgment of the Minnesota Court, rendered for a like cause, under a similar statute, and where jurisdiction was

<sup>1</sup> *Harding v. Alden*, 9 Greenl. 140, 147, 23 Am. D. 549; *Cooper v. Cooper*, 7 Ohio, 38; *Van Orsdal v. Van Orsdal*, 67 Iowa, 35.

acquired in the same manner. For it would certainly be a most inconsistent, not to say one-sided, position, to assert the right of the courts of this State to dissolve the marriage when one only of the married persons resided here, with reference to causes of divorce occurring while the parties were domiciled in another State where the other party remains, and then decline to give effect to a judgment of a sister State in a strictly analogous case. It cannot with any reason be claimed that this State may fix and determine the status or legal relation of married persons domiciled here — may grant valid *ex parte* decrees of divorce, releasing such persons from all duties and obligations connected with a former marriage — and yet deny the effect of such decrees when granted by the courts of our sister States. According to the principles of our own decisions, therefore, effect must be given to the judgment of the Minnesota Court, although the plaintiff had only constructive notice, by publication, of the divorce suit.”<sup>1</sup>

## II. *The Distinction between the Jurisdictions over the Marriage Status, or in Rem, and over its Incidentals, or in Personam.*

§ 14. **Principle of International Jurisdiction.** — Assuming, while not limiting our inquiry to matrimonial causes, that the law of the State of the court gives a jurisdiction in controversy, the question whether or not it is also international<sup>2</sup> depends on an axiomatic proposition, not admitting of being either strengthened or weakened by enunciations from the bench. It is that the jurisdiction exists if the thing is of a sort over which by the principles of interstate jurisprudence the particular government has a right of control, otherwise it does not. And —

§ 15. **Differing Cases.** — In applying this rule the result is found to be that the jurisdiction will adhere to the particular case or not, according to its nature, its subject-matter, and the relative situations of the parties as to each other, as to the thing in controversy, and as to the governing power under which the court sits.<sup>3</sup> Thus, —

§ 16. **Lands.** — Since every government has the right to determine all questions pertaining to the title and status of lands

<sup>1</sup> Shafer v. Bushnell, 24 Wis. 372, 376, 377.

<sup>2</sup> Ante, § 5, 8, 9.

<sup>3</sup> See Mostyn v. Fabrigas, Cowp. 161, 176; Boone v. Poindexter, 12 Sm. & M. 640.

within its local limits, and no nation can have any lawful power over what is thus by nature made permanent within the boundaries of another nation, no court will entertain jurisdiction between any parties, whether domestic or foreign, to try the title to real estate situated in another country. And this proposition extends in a considerable degree to collateral contracts and torts relating thereto.<sup>1</sup> On the other hand,—

§ 17. **Personal Rights.**—Men carry their personal rights, unlike their lands, about with them. And in whatever country one finds another and serves him with process from its courts, he may have redress for a wrong done to his person or personal effects in another country or State.<sup>2</sup> And—

§ 18. **Transitory.**—In broader terms, the courts will hear a variety of transitory complaints, whether founded in contract or in tort, between even foreign parties, for causes which arose in the foreign country.<sup>3</sup> Again,—

§ 19. **Personal Things — In Rem.**—Personal effects, being, like the person, transitory, are subject to the governmental power prevailing at the place wherein, either temporarily or permanently, they are.<sup>4</sup> There the title to them, and whatever else pertains to their status, may be established or varied in what is termed an action *in rem*. This action is maintainable in the jurisdiction where the thing is found, and it is not elsewhere.<sup>5</sup>

§ 20. **Term "In Rem."**—In the strictest use of language, "that only," to quote from Fuller, C. J., "is a proceeding *in rem*, in which the process is to be served on the thing itself,"<sup>6</sup> and in which the

<sup>1</sup> Bishop Non-Con. Law, § 1279; Story Conf. Laws, § 553-555; Lord Mansfield in *Robinson v. Bland*, 2 Bur. 1077, 1079; *Howard v. Ingersoll*, 17 Ala. 780; *Eachus v. Illinois, &c. Canal*, 17 Ill. 534; *Thayer v. Brooks*, 17 Ohio, 489, 49 Am. D. 474; *Doulson v. Matthews*, 4 T. R. 503; *Mason v. Warner*, 31 Mo. 508; *Hawley v. James*, 7 Paige, 213; *Edwards v. Ballard*, 14 La. An. 362; *Howard v. Ingersoll*, 23 Ala. 673; *Watts v. Kinney*, 6 Hill, N. Y. 82.

<sup>2</sup> Bishop Non-Con. Law, § 1276-1278; *Alley v. Caspari*, 80 Me. 234, 6 Am. St. 178; *Rogers v. Woodbury*, 15 Pick. 156; *Loyd v. Hicks*, 31 Ga. 140; *Swan v. Smith*, 26 Iowa, 87; *Miller v. Black*, 2 Jones, N. C. 341; *Walters v. Breeder*, 3 Jones, N. C. 64; *Ward v. Lathrop*, 4 Tex. 180.

<sup>3</sup> *Roberts v. Knights*, 7 Allen, 449;

*Barrell v. Benjamin*, 15 Mass. 354; *Taylor v. Carpenter*, 3 Story, 458; *Ackerson v. Erie Ry.* 2 Vroom, 309; *Mostyn v. Fabrigas*, Cowp. 161.

<sup>4</sup> *McMullen v. Guest*, 6 Tex. 275; *The Ada, Daveis*, D. C. 407; *The Santissima Trinidad*, 7 Wheat. 283, 354, 355. And compare 1 Bishop Crim. Law, § 816-835.

<sup>5</sup> Story Conf. Laws, § 549, 592; *Hickey v. Stewart*, 3 How. U. S. 750; *Castrique v. Imrie*, Law Rep. 4 H. L. 414, 429; *Whitney v. Walsh*, 1 Cush. 29, 48 Am. D. 590; *The Charkieh*, Law Rep. 4 A. & E. 59, 91; *The Bee*, 1 Ware, 332; *Thompson v. Morton*, 2 Ohio St. 26, 30; *The Rio Grande*, 23 Wal. 458; *Heidritter v. Elizabeth Oil-cloth Co.* 112 U. S. 294. And see 1 Bishop Crim. Law, § 816-835.

<sup>6</sup> *Cole v. Cunningham*, 133 U. S. 107, 116.

judgment is binding on all the world.<sup>1</sup> But there are multitudes of proceedings, partly within this defining and partly outside of it, sometimes termed *quasi in rem*, or in the nature of actions *in rem*, which are governed part way by the strict rule thus stated, and part way by some other rule, or which are to a certain extent *in rem*, and to a certain other extent *in personam*. These are often in our books spoken of, for short, simply as actions *in rem*, — a use of language which is convenient, and not practically misleading. Thus Greenleaf speaks of “cases usually termed proceedings *in rem*, which include not only judgments of condemnation of property as forfeited, or as prize, in the Exchequer or Admiralty, but also the decisions of other courts directly upon the personal status or relations of the party, such as marriage, divorce, bastardy, settlement, and the like.”<sup>2</sup> Further to illustrate, —

§ 21. **Probate.** — The probate of a will is, within this larger definition, *in rem*;<sup>3</sup> though nothing is seized, and there is no service of process on a “thing.” Again, —

§ 22. **Suit by Attachment.** — A suit at law, accompanied by an attachment of the defendant's property, is both *in personam* and *in rem*.<sup>4</sup> Then, if there has not been adequate notice to make it valid *in personam*, it may be binding *in rem*; or, if the notice has been adequate, it may be good as to both.<sup>5</sup> Now, —

§ 23. **Marriage and Divorce Litigation** — pertains, like a suit by attachment, both to the *in rem* and the *in personam*. As to the collateral property relations of the married parties, which they carry about with them, it is strictly *in personam*; as to their status of married or single, including rights which are directly depending thereon, and which in their nature are local to their domicile, and so are governed by the law of the domicile,<sup>6</sup> it is *in rem*.<sup>7</sup> Like anything else, this suit takes its forms and its consequences from the law of the particular matter in controversy. So far as it is *in personam*, it is still matrimonial; therefore it differs from an action on a promissory note. So far as it is *in rem*, it is likewise matrimonial; consequently it is a great way from being identical

<sup>1</sup> *Heidritter v. Elizabeth Oil-cloth Co.* 112 U. S. 294, 300; *S. v. Central Pac. Rld.* 10 Nev. 47.

<sup>2</sup> 1 Greenl. Ev. § 525.

<sup>3</sup> *Gaines v. Fuentes*, 92 U. S. 10, 21.

<sup>4</sup> *Cooper v. Reynolds*, 10 Wal. 308.

<sup>6</sup> *Story Conf. Laws*, § 549, 592, 592 a;

*Pennoyer v. Neff*, 95 U. S. 714; *Bissell v. Briggs*, 9 Mass. 462, 468, 6 Am. D. 88; *Cole v. Cunningham*, 133 U. S. 107.

<sup>6</sup> Vol. I. § 835–837, 839.

<sup>7</sup> *In re Newman*, 75 Cal. 213; *Niboyet v. Niboyet*, 4 P. D. 1, 12; *Ellison v. Martin*, 53 Mo. 575, 578.

with an admiralty proceeding to declare the forfeiture of a prize. Hence,—

§ 24. **Elsewhere.**—Keeping in mind these general views, we shall trace out the details of the distinction in subsequent chapters.

### III. *The Distinction between the Jurisdictions over one of the Married Parties and over both.*<sup>1</sup>

§ 25. **Control of Person or Thing.**—A court does not acquire in a case the international jurisdiction until it has obtained such control over the person or thing as the circumstances reasonably permit. For example, there is no jurisdiction *in personam* unless the defendant appears, or is duly served with process within the State,—a proposition usually applied, perhaps limited, to non-resident defendants.<sup>2</sup> So, in cases *in rem*, within the strict meaning of the term already explained,<sup>3</sup> there is no interstate jurisdiction until the tangible thing has been seized, or otherwise the court has an actual power over it;<sup>4</sup> but the person need not be seized or notified or otherwise brought within the court's control when not practicable.<sup>5</sup> For the peculiarity of this proceeding consists of holding and acting upon the thing instead of the person; and to require notice in fact to the person, when in another jurisdiction, would render judicial steps impossible, and terminate the suit without effect.<sup>6</sup> Yet—

§ 26. **In Nature of in Rem.**—Where the *res* is not a tangible thing, by reason whereof it cannot be seized,—for example, where it consists of the various interests which a will establishes,<sup>7</sup> or where it is a status, such as legitimacy, marriage, or the like, or where one is to be put under guardianship,<sup>8</sup>—there can be no

<sup>1</sup> Compare with post, § 131–158.

<sup>2</sup> *Pennoyer v. Neff*, 95 U. S. 714; *Hart v. Sansom*, 110 U. S. 151; *Smith v. Grady*, 68 Wis. 215; *Parrott v. Alabama Gold Life Ins. Co.* 4 Woods, 353; *Knowles v. Gaslight, &c. Co.* 19 Wal. 58; *Public Works v. Columbia College*, 17 Wal. 521; *Bischoff v. Wethered*, 9 Wal. 812; *Flowers v. Foreman*, 23 How. U. S. 132; *In re Tracy*, 1 Paige, 580; *In re Pettit*, 2 Paige, 174; *Gray v. Hawes*, 8 Cal. 562; *Lutz v. Kelly*, 47 Iowa, 307; *Wright v. Boynton*, 37 N. H. 9, 72 Am. D. 319; *Moulin v. Trenton Mutual, &c. Ins. Co.* 4 Zab. 222;

*Ferguson v. Mahon*, 11 A. & E. 179; *Buchanan v. Rucker*, 9 East, 192.

<sup>3</sup> Ante, § 20.

<sup>4</sup> *The Santissima Trinidad*, 7 Wheat. 283, 355; *Rose v. Himely*, 4 Cranch, 241; *Heidritter v. Elizabeth Oil-cloth Co.* 112 U. S. 294.

<sup>5</sup> *Pasteur v. Lewis*, 39 La. An. 5.

<sup>6</sup> *Story Conf. Laws*, § 549; *Castrique v. Tomlinson*, Law Rep. 4 H. L. 414; *Smith v. Nicolls*, 5 Bing. N. C. 208.

<sup>7</sup> Ante, § 21.

<sup>8</sup> *Angell v. Angell*, 14 R. I. 541.

tangible possession, yet there can and should be such constructive or actual notice<sup>1</sup> as the circumstances of the case allow and the law which governs the particular court requires. Thereby good faith, which our legal rules always demand of parties, is secured and evidenced. So the doing of what is thus seen to be impossible is not essential to the jurisdiction; but the doing of what is thus possible and required by the law is indispensable,—a doctrine to be explained, and enforced by abundant authorities, in various places as we proceed. We have now reached the end and purpose of this sub-title; namely,—

§ 27. **Parties' Persons — Their Status.** — A divorce or other matrimonial suit being both *in rem* and *in personam*,<sup>2</sup> if the court by reason of non-residence or otherwise has no jurisdiction over one of the parties, but has a jurisdiction over the status of the other party, it can proceed to affirm, annul, or qualify such status, this being matter *in rem*. But it cannot fix the collateral rights of property of the absent party, unless he has been served with process within the jurisdiction, or without service has appeared in the suit. This doctrine, with the authorities on which it rests, will be more specifically explained in subsequent chapters.

#### IV. *Synopsis of Resulting Rules.*

§ 28. **Foregoing Doctrines — Things not thought of.** — All the doctrines thus far stated in this chapter are, when viewed simply as here set down, accepted, it is believed, by all our tribunals. But what is thus known and accepted may be, and it sometimes is, overlooked; so that we have a few exceptional cases or courts wherein a particular one of these doctrines is, though not denied, simply not thought of, resulting in the miscarriage of justice. This overlooking of things—not denying a doctrine which should govern a case, but simply not thinking of it—is the principal source of the blemishes appearing in our adjudged law, both in this department of it and in all the others. This matter was referred to at numerous places in the first volume.<sup>3</sup> It has been the practice of the present writer, beginning with his work on

<sup>1</sup> *Dorr v. Rohr*, 82 Va. 359, 3 Am. St. 106. 643, 644, 662, 664, 674, 690-701, 872-876, 963, 976, 1042, 1126 and note, 1135, 1393, 1498, note, 1747. I have put in italics a

<sup>2</sup> Ante, § 23.

<sup>3</sup> For example, Vol. I. § 9, 11-13, 19, 21, 35, 370-374, 462, 489, 490, 549, 617, particularly refer.

“Marriage and Divorce” and proceeding thus through all his other writings, to point out to his readers the omissions as they presented themselves, and the consequent true path of decision,—not always or commonly in the full explanatory terms here indicated, but always in a way to enable the reader, whether practitioner or judge, to see the true path, *if he will take the trouble to look for it and to think*. For law is a part of our earthly existence. The human mind, therefore, was by the Creator adapted to comprehend it; so that two minds, truly seeing it, would not understand it in two different ways or otherwise differently. And the author is able to say that his experience demonstrates the correctness of this proposition; for whenever in his writings he has stated the omitted thing by reason whereof justice has miscarried, the courts have always afterward corrected the error, *if they have looked to see the thing omitted*. Such is the uniform course of the human intellect. If two men look at the picture of a ship sailing through water, their eyes in a normal condition and the light perfect, the one does not say that the thing on the water is a ship, and the other that it is a mad bull, or the one that it is represented to be in motion and the other to be at rest. Both as to the thing itself and as to the conclusions from it they are exactly in accord. It is the same with all these legal questions. Where the various considerations governing a question enter the minds of two lawyers, if those minds are in a normal condition, and both truly apprehend the considerations, and neither is disturbed by extraneous ones, their conclusions are just as certain to be identical as if the thing pictured were water upon which was a ship under sail. But eliminate from the intellectual view a controlling thing which ought to be in the legal picture, then submit the question to either mind, and the answer will be changed. And if one mind takes in the picture with the thing omitted, and the other takes in the whole picture, the two decisions will differ. Thereupon we say that the matter is one upon which legal opinions are in discord. Now, —

§ 29. **Incorrect Decisions.** — Our books of reports disclose occasional instances wherein the judges have overlooked some one of the distinctions stated in the foregoing sections, thereupon pronouncing a decision contrary to the truth of the law. In chapters following, these instances will be pointed out as we proceed. Thus, to mention a prominent one of them, we have seen that

a divorce suit is *in rem* as to the status of the marriage, and *in personam* as to collateral property rights.<sup>1</sup> Thereupon it has now and then happened, in a divorce suit involving the status of the marriage, or in an inquiry into the validity of a divorce rendered in another State, that the court has been utterly oblivious to this distinction; and assumed as of course that the proceeding was simply *in personam*, and finding that there was no adequate service of process *in personam*, and no appearance by the defendant, has denied the jurisdiction as well over the marriage status as over the rest, though the status was a thing within the admitted control of the government under which the divorcing tribunal sat. The omission of the thing not thought of has worked in the judicial mind as absolute a delusion as is that in the mind of an insane man who looks upon his best friend as an enemy. It is even amusing to see a bench of judges thus blindly denounce another bench that had the good fortune to see what itself did not discern. A decision so rendered is, upon a true view, of no value either in domestic or in international jurisprudence. Passing by these exceptional cases, we may deem the following rules to be established equally in authority and in reason; namely,—

§ 30. **For Domestic Purposes.**—Rule 1. The courts, in subordination to the legislature, must accept whatever divorce jurisdiction it commands. And their decrees will be binding in their own country or State, not necessarily in another.

§ 31. **For International Purposes.**—Rule 2. There can be no international jurisdiction except in compliance also with the domestic law. And to render a domestic jurisdiction international, the thing adjudged must be such as, under the circumstances, to be within the control of the government under which the court sits, as viewed by the law of nations. Thus,—

§ 32. **Marriage Status.**—Rule 3. Every government is internationally entitled to establish, and change from time to time, the status of its own domiciled subjects, but not that of the subjects of any other government. Therefore the courts of the domicile of married parties have the jurisdiction to determine, or to reverse or modify, the status, as married or single, of all persons domiciled in the country, but not that of any others.

§ 33. **Different Domicils.**—Rule 4. Two persons dwelling together in matrimony have but one domicil; it is the husband's,

<sup>1</sup> Ante, § 23.



because in law he is entitled to fix the abode for both.<sup>1</sup> But for the purpose of divorce jurisdiction, the parties may have separate domicils; since the *delictum* on which the divorce suit proceeds has necessitated and justified a living apart; and since, without the right of separate domicil, a wronged wife might be deprived, by the husband's further wrong, of the redress which the law had given her.<sup>2</sup>

§ 34. **In Cases of Different Domicils.** — Rule 5. If the husband is domiciled in one State and the wife in another, the courts of the domicil of either may change the status of its subject, — in other words, may undo the *vinculum* of the marriage. The courts of the domicil of the other party will not accept the proceeding as a judgment against their domiciled subject; but still they will hold the judgment effectual for its purpose. If such subject, for example, is the husband, they will recognize the fact that by reason of what has transpired he has ceased to have a wife. And by their own law, which in this case provides the rule, his ceasing to have a wife has rendered him a single man, the same as though the wife had died in the foreign State.<sup>3</sup>

§ 35. **Property Rights.** — Rule 6. Those property rights which for their existence depend simply on the status, whereof dower and curtesy at the common law are familiar illustrations, fall with the breaking of the marriage *vinculum*. But those which require the judgment of a court for their enforcement, and without which they have no tangible being, — for example, the wife's alimony, — can be made internationally available only upon a jurisdiction *in personam*.<sup>4</sup> Hence, —

§ 36. **In Personam — In Rem.** — Rule 7. Under the international rule, the jurisdiction *in rem* is sufficient in a proceeding to determine or to dissolve the marriage status. But to charge a husband with alimony, or to enforce any other collateral pecuniary claim, there must be a jurisdiction *in personam*.<sup>5</sup>

§ 37. **Notice.** — Rule 8. In the proceeding *in rem*, it is proper that the defendant should be served with process within the locality of the court. But if he is not there, any notification through the newspapers or otherwise which complies with the local statute and evinces good faith, *a fortiori* an actual appear-

<sup>1</sup> Vol. I. § 1713-1720.

<sup>2</sup> Post, § 112-127.

<sup>3</sup> Vol. I. § 698-702; post, § 131-158.

<sup>4</sup> Post, § 50, 68-74, 78-82. More particularly, see the last three chapters of this volume.

<sup>5</sup> *Ib.* and post, § 131-158.

ance, will internationally suffice.<sup>1</sup> For the jurisdiction *in personam*, a service on the person within the State, or an appearance, is necessary.<sup>2</sup>

§ 38. **Place, Domicil, of Delictum.** — Rule 9. In exceptional States, and in violation of just principle, regard is had to the place where the offence was committed, to the domicil of the parties at the time of its commission, and to some other like things. But by the doctrine of most of our courts, and on a true view of this question, all such things are immaterial,—the right of each State to determine and regulate the status of its domiciled subjects being the supreme consideration, which overrides and controls whatever is subordinate thereto.<sup>3</sup>

§ 39. **Nullity — Dissolution — Bed and Board — Confirmation of Marriage.** — Rule 10. The foregoing rules are coextensive with the reasons from which they proceed. It will be perceived, therefore, that they apply equally to the suit to declare a marriage null from the beginning, to that to dissolve an originally valid marriage, to that for a divorce or separation from bed and board, and to the proceeding to establish a doubtful marriage. For the reason is the same in these several cases.<sup>4</sup>

#### § 40. *The Doctrine of this Chapter restated.*

A true apprehension of the law's distinctions is essential to an understanding of the rules for divorce jurisdiction. There are cases wherein immaterial distinctions have been drawn and insisted upon by judges. They are blemishes in our books, and their practical effects are only evil. Therefore our first step in these inquiries into divorce jurisdiction should be to distinguish between the distinctions, to reject the immaterial ones, and to lay the material ones clearly in our understandings. An exact comprehension of the ten rules just stated will serve as the best guide through the remaining parts of this exposition.

<sup>1</sup> Post, § 140-142.

<sup>2</sup> Post, § 77-79.

<sup>3</sup> Post, § 160-178.

<sup>4</sup> Post, § 66-74.

## CHAPTER II.

## THE JURISDICTION CONFERRED BY DOMICIL.

- § 41. Introduction.
- 42-47. General Doctrine.
- 48-51. Its Developments in United States.
- 52-57. In England.
- 58-60. In Dominion of Canada.
- 61-65. In Scotland.
- 66-74. To what Classes of Cases Doctrine applied.
- 75. Doctrine of Chapter restated.

§ 41. **How Chapter divided.**—We shall consider, I. The General Doctrine; II. The Developments of the Doctrine in the United States; III. The Developments of the Doctrine in England; IV. The Developments of the Doctrine in the Dominion of Canada; V. The Developments of the Doctrine in Scotland; VI. To what Classes of Cases this Doctrine of the Domicil is applied.

I. *The General Doctrine.*

§ 42. **Already,**—in the first volume, we have seen something of this doctrine, and to what extent and why it differs from the rule governing the original constitution of a marriage.<sup>1</sup> It is—

§ 43. **Defined.**—By the international law, therefore also by the law of each particular State except where the local institutions or the express terms of a statute forbid,<sup>2</sup> it is within the authority of every State<sup>3</sup> to determine through its judicial tribunals what shall be the matrimonial status of all persons domiciled therein, and on the other hand it is the duty of its courts to take cognizance of the status of transient persons as being what it is in the country of their domicil, yet not to attempt to change it or otherwise permanently interfere therewith. So that the courts of the domicil of all persons have, if the local laws or statutes permit, the juris-

<sup>1</sup> Vol. I. § 833-839, 843, 848.

<sup>3</sup> Ante, § 14.

<sup>2</sup> Ante, § 6, 7, 10-13.

diction to dissolve a marriage, to declare it void, to confirm it if questioned, or to vary (as, for example, by a decree of divorce from bed and board) the terms of the marriage status.<sup>1</sup> But without a domicil there is no jurisdiction to change or modify a marriage status. The authorities sustaining this doctrine will appear as we proceed. To state the doctrine in language somewhat different,—

§ 44. **Otherwise Expressed.**—Since marriage is an institution of international law, including the law of nature whereby all marriageable persons are entitled to enter into it at will; since the law of nations requires the courts of every country to accept as international all Christian marriages in whatever country celebrated; and since divorce is not a natural right universally recognized, but is only permitted in certain States for causes locally deemed adequate, to be ascertained by judicial investigation and evidenced by judicial decree,<sup>2</sup>—it follows that a jurisdiction to take collateral cognizance of a marriage celebrated in another country, and one to set up, annul, or modify the status of a marriage viewed as a permanent thing, are altogether dissimilar, and the one may exist without the other. And it follows that there cannot be, at one and the same time, two judicial jurisdictions under two separate governments to modify, annul, or confirm the status of one and the same marriage of parties having one and the same domicil; because, among other reasons, thereby the international law would be divided against itself, and the same parties might at the same instant be rendered both married and single. Since, therefore, there can be but one jurisdiction for any matrimonial cause, wherein permanently to settle the status of two persons as intermarried or single, that jurisdiction must be in the courts of their domicil. And the reason is that every independent government is entitled to manage its own local affairs, and no other government can lawfully interfere therein. And it would be an interference for the courts of a country in which parties are not domiciled to undertake to change their marital status in the country of their domicil. So that the rule we are considering has become a necessity in interstate jurisprudence. Moreover, the government under which a court sits has no interest in a foreign status; added to which consideration,

<sup>1</sup> Post, § 66-74.

propositions, Vol. I. § 7, 39, 40, 48, 237,

<sup>2</sup> Consult, in connection with these 246, 295, 300-315, 320, 385, 717, 833-839.

comity, that in some other cases invites a jurisdiction, forbids it in this case.<sup>1</sup>

§ 45. **Whence Doctrine derivable.**— This doctrine, partly to repeat, results from the familiar principle of international law, that each nation is exclusively sovereign within its own territory;<sup>2</sup> and as the like sovereignty exists also in every other nation, each is precluded from exercising authority beyond the limits of its own dominions.<sup>3</sup> We have seen<sup>4</sup> that marriage is a status; therefore the question of divorce is one of status. And the status of the people of a country is as distinctly local to their domicile as is the soil itself.<sup>5</sup>

§ 46. **The Reasons** — for this doctrine might be, in form, indefinitely multiplied;<sup>6</sup> but, in substance, they would consist

<sup>1</sup> "The status of a stranger, as married or unmarried, divorced *à vinculo matrimonii*, or only separated *à mensa et thoro* by judicial sentence for adultery, cannot be a matter of any concern to the law of the country before the tribunal of which he happens to be convened during a transient residence." Opinion of two of the judges, in *Duntze v. Levett*, Ferg. 68, 106, 3 Eng. Ec. 360, 371.

<sup>2</sup> Story Conf. Laws, § 18.

<sup>3</sup> *Ib.* § 20.

<sup>4</sup> Vol. I. § 11. "In the opinion of the greater number of jurists, the law of the actual domicile, and not that of the domicile of origin, determines the status or capacity, in every case except in that of legitimacy or illegitimacy, and the capacity to become legitimated by the subsequent marriage of the parents, and of freedom or slavery. This opinion is supported by the preponderance of authority, and is most consistent with the principles on which the recognition of a foreign law is founded." 1 Burge Col. & For. Laws, 13, 14. See also Story Conf. Laws, § 51.

<sup>5</sup> Ante, § 16.

<sup>6</sup> **Some of the Reasons.**— Until recently, as we shall see in a later sub-title, the Scotch courts refused to accept for jurisdiction the rule of the domicile, and in various circumstances undertook to divorce non-domiciled parties. Thereupon, in the later editions of my "Marriage and Divorce," I had a note which in substance is as follows:—1. There is before me a tract of 79 pages, written by Mr. Fraser,

whose work on the Scotch Law of the Domestic Relations has been often referred to in these volumes; wherein, in 1860, he attempted, among other things, to show that the rule of the domicile is not the true rule; and that, while it had theretofore not been followed in Scotland, neither had it been uniformly followed by the English tribunals. As to what had been, in these two countries, his statement is beyond question accurate. As to how it should be, he said: "When English lawyers insist upon domicile as the sole basis of jurisdiction in cases of divorce, and assume the responsibility of setting aside the decrees of foreign tribunals, they are bound to give to the world reasons for their conduct. The *ipse dixit* of an English judge is not sufficient in the great republic of jurists; and yet one searches in vain through the roll of cases from *Coway v. Beazley* to that of *Tollemache*, for any reason, except the *sic volo sic jubeo* of the court. It has never been explained why the law of domicile should prevail before every other, when others have the sanction of expediency [have they?]  
— the interests of humanity and justice [has anybody ever explained that they have?]  
— and the recommendation of a long antiquity in their favor." *Fras. Conf. Laws of Div.* 45.

2. It is not proposed here to inquire whether or not the English judges have done their duty in the way of giving reasons; but if what Mr. Fraser calls "the great republic of jurists" honor me with

simply of varying aspects of the one reason; namely, that any other rule would place every nation, as to its domestic affairs,

looking into my book, I trust he will not tell them I have given no reasons, however he may be justified in saying they are not good ones.

3. Various reasons, such as they are, — a part of them my own, and others the reasons of persons to whom I have given credit for them, — are interspersed through the text and notes of the present series of chapters, and the chapter in the first volume on "Marriage entered into Abroad," § 825-920; but some others, including also some repetitions, will be added here. In this world of large dimensions, there is a wide field of choice open to persons as to where they will live. If a man and his wife choose England, they may; if Scotland, they may; and so of the other countries. Now, should the status of matrimony not be determined, as to its dissolution, by the laws and courts of the country where they live, but by those of some other, then there is no country whose domestic affairs may not be constantly disturbed by any and every other governmental power. If a man and his wife have chosen to live in Scotland, is it "expedient," and do "the interests of humanity and justice" demand, that a tribunal in Massachusetts shall take the oversight of their domestic affairs, and divorce them whenever either does what would be a cause of divorce by Massachusetts law? Let us suppose the woman wishes to play the harlot for a while, and taking a fancy to the Americans, comes on her pleasure tour to Boston: a Massachusetts court might, indeed, and very properly, punish her for the crime of her adultery; but with what propriety can it decide that she shall not thereafter be, in law, a wife at home? Or, if the Massachusetts law made it, as it does not, a cause of divorce for a wife to profess the religion of Scotland contrary to her husband's wishes, then, if the wife of a member of the Scotch Church should be found here on a casual visit to old Scotch friends, partaking of the communion with them, her home being in Scotland, would "humanity and justice" require the Massachusetts courts to send her back to Scotland di-

vorced? When, it seems to me, a writer tells us that the principle of allowing the courts of a country where neither of the parties lives, to divorce them, has "the sanction of expediency," he should explain what kind of "expediency" it is which thus "sanctions" the intermeddling, by the tribunals of one country, in the domestic affairs of another. And when he adds that "the interests of humanity and justice" demand the intermeddling, he should explain by what right nations are, through their laws and their tribunals, to administer justice and set up the humanities in each other's dominions.

4. Practically, too, if Massachusetts attempts to regulate the domestic relations of people dwelling in Scotland, or if Scotland attempts the same of those residing in Massachusetts, however professing to be influenced by "expediency," "humanity," or "justice," the attempt will fail, unless the one power first subjugates the other, and it ceases to be independent. In other words, the existence of two countries as independent the one of the other implies, *ex vi termini*, that each shall determine for itself when the band of marriage shall be unloosed from a domiciled subject, and neither shall determine this question for the other. And when, in connection with this doctrine, it is also held, as it is by our American tribunals generally, that husband and wife may for divorce be domiciled in different countries (post, § 112-127), surely there can be no lack of justice to be complained of in the rule which refers the question to the domicil. If Mrs. Doe lives in Scotland, and does not like either her husband or the Scotch law, but admires Massachusetts and Massachusetts law, she is at liberty to come here; and if she comes *bona fide*, *animo manendi*, without her husband, and he has done what authorizes a divorce according to our law, she can after waiting a few years have her divorce. The Scotch tribunals can still hold her to be the wife of the Scotch husband if they choose; their liberty is not impaired; the Scotch law is not interfered with; and if she came, as she professed, *bona fide*, to

under the dominion of every other, at the same time degrading marriage from its high position in the law of nations, to become the sport of the shifting whims of all the nations temporarily visited by the parties or one of them. So that, of necessity, domicile gives the divorce jurisdiction,—a conclusion inevitable in the framework of law.

§ 47. *Domicil changed during Suit.*—On a question apparently not settled by adjudication, if, after a suit for divorce has been brought, both the parties change their domicile to another country, it follows from the foregoing elucidations that the jurisdiction of the court has terminated, and there can be no divorce sentence. For in a matter of this sort, there can be no waiver of jurisdiction by a plea, or an omission to plead.<sup>1</sup> When the *res*—the status<sup>2</sup> on which an action for dissolution is to operate—is taken out of the country, this, in principle, would seem to be like the death of the parties in a personal action; except that the abatement would be absolute, there being no legal representatives in whose interest it could be revived. Should a statute command otherwise, the court must obey it, however invalid its decree will be under the international law. Thus, under a provision directing

make her home in this New World, she is not harmed. Yet as she has become foreign to the Scotch people, the rule of international law requires the Scotch courts and all others now to look upon her as bearing the status which she does in the place of her domicile; that is, as being a single and not a married woman. As to her late husband, the case is different. The courts of Scotland will violate no rule of international law if they hold that he still retains the status of a married man, though he has no longer a wife. This is a pure matter of domestic regulation, about which Scotland is just as free to follow her choice as Massachusetts was hers with respect to the divorce. It is true that the institution of a new domestic relation, to consist of married men with no wives, and married women with no husbands, having the power to commit polygamy by marrying, would appear a little startling had not the "foundation" for it been already laid by the blunderings of one or more of our American courts. Vol. I § 698-702; post, § 153-158. The case, as to Scotland, would be

the same as though the woman had been in Massachusetts hung, pursuant to judicial sentence. A Scotch court might say that Massachusetts had no right to hang her, therefore Mr. Doe remains a married man. Or—a principle on which one or more exceptional cases in our own country proceeded—it might say that though the woman is properly and lawfully dead, yet as Mr. Doe had no notice, and Scotland took no part in the execution, he must still be held to be, in Scotland, a married man. But most Americans would suggest to the Scotch judge, whether in a case of actual hanging, or in one of *ex parte* divorce wherein the woman has ceased to be a wife just as effectually as though her life were ended: "Since the man who remains in Scotland has lost his wife, perhaps you might as well acknowledge the fact and let him take another."

<sup>1</sup> See, for example, as to questions not of divorce, *Smith v. Kernochen*, 7 How. U. S. 198; *De Wolf v. Rabaud*, 1 Pet. 476; *Maisonnaire v. Keating*, 2 Gallis. 325; *Rea v. Hayden*, 3 Mass. 24.

<sup>2</sup> Ante, § 20, 23, 26, 27, 32, 36.

divorce "on petition filed by any person who, at the time of the filing of such petition, shall have been a *bona fide* resident of the State one year previous to the filing of the same, and a resident of the county at the time of the filing of such petition," the court said: "We suppose this statute does not admit of any interpretation different from its literal reading; that, if the applicant was in good faith a resident at the time named, non-residence at the time of trial would not prevent the court from acting in the premises."<sup>1</sup>

## II. *The Developments of the Doctrine in the United States.*

§ 48. **Domicil the Rule.** — In the details of this doctrine, we shall see in a subsequent chapter, there has been with us some conflict of judicial opinion. But as long ago as when Story wrote, he was able to state, in general terms, as follows: "The doctrine now firmly established in America upon the subject of divorce is, that the law of the place of the actual *bona fide* domicil of the parties gives jurisdiction to the proper courts to decree a divorce for any cause allowed by the local law, without any reference to the law of the place of the original marriage, or the place where the offence for which the divorce is allowed was committed." And so it remains to the present day.<sup>2</sup>

§ 49. **The Principle** — on which this doctrine proceeds is explained in the last sub-title. It is not limited to matrimonial causes, but it extends equally to every other sort of domestic status. For example, during the time of slavery with us, Taney, C. J., speaking in and for the Supreme Court of the United States, and having more particularly in view the relation of master and slave, expressed the doctrine, which is also applicable to marriage<sup>3</sup> and every other status, as follows: "Every State has an undoubted

<sup>1</sup> *Waltz v. Waltz*, 18 Ind. 449, 450, opinion by Hanna, J.; *Baily v. Schrader*, 34 Ind. 260.

<sup>2</sup> *Story Conf. Laws*, § 230 *a*; *Harding v. Alden*, 9 Greenl. 140, 23 Am. D. 549; *Tolen v. Tolen*, 2 Blackf. 407; *Wall v. Williamson*, 8 Ala. 48; *Wall v. Williams*, 11 Ala. 826; *Hanover v. Turner*, 14 Mass. 227, 7 Am. D. 203; *Fellows v. Fellows*, 8 N. H. 160; *Barber v. Root*, 10 Mass. 260; *Pawling v. Willson*, 13 Johns. 192; *Jack-*

*son v. Jackson*, 1 Johns. 424; *Pomeroy v. Wells*, 8 Paige, 406; *Freeman v. Freeman*, 3 West. Law Jour. 475; *Maguire v. Maguire*, 7 Dana, 181; *Harrison v. Harrison*, 19 Ala. 499; *Steele v. Steele*, 11 C. E. Green, 85; and multitudes of other cases which will be referred to in the further elucidations of this and subsequent chapters.

<sup>3</sup> *Cheever v. Wilson*, 9 Wal. 108.



right to determine the status, or domestic and social condition, of the persons domiciled within its territory.”<sup>1</sup> So that —

§ 50. **No Domicil, no Jurisdiction.**—No court of a State wherein neither of the parties has a *bona fide* domicil has, in our interstate law, any jurisdiction over their marriage status. The presence of one or both of them and, since the State of their domicil has an interest in their marriage,<sup>2</sup> the submission of the defendant to the jurisdiction, cannot, singly or together, render the result otherwise.<sup>3</sup> This question has assumed various forms, under varying circumstances, and the conclusion has in all been the same. There must be a domicil, in distinction from a temporary abiding, and the residence must be, in the words of Ryan, C. J., “actual and *bona fide, animo manendi*.”<sup>4</sup> And whenever the courts of one State have taken jurisdiction without a domicil, those of the others have pronounced the divorce sentence void.<sup>5</sup> An illustration of this doctrine has occurred in some not very remote —

§ 51. **Utah Divorces.**—The legislature of this territory, under Mormon control, for a long series of years authorized its courts to take jurisdiction for divorce whenever the applicant either was or *wished to become* a resident of Utah. Thereupon great numbers of married persons in our States were desirous of living in Utah,

<sup>1</sup> *Strader v. Graham*, 10 How. U. S. 82, 93.

<sup>2</sup> Vol. I. § 72-75. See post, § 157.

<sup>3</sup> Authorities cited ante, § 48; also *Fellows v. Fellows*, 8 N. H. 160; *Hanover v. Turner*, 14 Mass. 227, 7 Am. D. 203; *Barber v. Root*, 10 Mass. 260; *Thompson v. S.* 28 Ala. 12; *Ditson v. Ditson*, 4 R. I. 87, 93; *Pawling v. Willson*, 13 Johns. 192; *Jackson v. Jackson*, 1 Johns. 424; *Yates v. Yates*, 2 Beasley, 280; *House v. House*, 25 Ga. 473; *Dolphin v. Robins*, 7 H. L. Cas. 390; *Leith v. Leith*, 39 N. H. 20; *Gettys v. Gettys*, 3 Lea, 260, 31 Am. R. 637; *Strait v. Strait*, 3 MacAr. 415; *Gregory v. Gregory*, 78 Me. 187, 57 Am. R. 792; *Van Fossen v. S.* 37 Ohio St. 317, 41 Am. R. 507; *Watkins v. Watkins*, 135 Mass. 83, 84; *Sewall v. Sewall*, 122 Mass. 156, 23 Am. R. 299; *Neff v. Beauchamp*, 74 Iowa, 92. In *Bradshaw v. Heath*, 13 Wend. 407, 422, *Savage, C. J.* observes that in *Jackson v. Jackson* both parties appeared, “and therefore the court had jurisdiction of the persons of the parties,”

but the divorce was held void because there was no jurisdiction over the subject-matter. s. p. in *Maguire v. Maguire*, 7 Dana, 181; *Pomeroy v. Wells*, 8 Paige, 406; *Tolen v. Tolen*, 2 Blackf. 407; *Freeman v. Freeman*, 3 West. Law Jour. 475; *White v. White*, 5 N. H. 476; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. D. 227; *Hare v. Hare*, 10 Tex. 355; *Vischer v. Vischer*, 12 Barb. 640; *Coddington v. Coddington*, 5 C. E. Green, 263; *Hoffman v. Hoffman*, 46 N. Y. 30; *Kerr v. Kerr*, 41 N. Y. 272; *Phelps v. Baker*, 60 Barb. 107; *Shaw v. Attorney-General*, Law Rep. 2 P. & M. 156; *Shaw v. Gould*, Law Rep. 3 H. L. 55; *Shannon v. Shannon*, 4 Allen, 134.

<sup>4</sup> *Dutcher v. Dutcher*, 39 Wis. 651.

<sup>5</sup> Cases in the note before the last; *Platt's Appeal*, 80 Pa. 501; *Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. R. 299; *Sewall v. Sewall*, 122 Mass. 156, 23 Am. R. 299; *P. v. Dawell*, 25 Mich. 247, 12 Am. R. 260; *Smith v. Smith*, 13 Gray, 209.

acting hereon so far as to obtain the qualifying divorce, no further. Then, entering into fresh marriages, they were indicted for polygamy or for adultery;<sup>1</sup> and it has been uniformly held, nor has there been even a doubt, that the Utah divorce was null, affording no protection to the defendants.<sup>2</sup> And it has been the same where the question of the Utah divorce has arisen in other issues.<sup>3</sup>

### III. *The Developments of the Doctrine in England.*

§ 52. **In General.** — There have been English decisions which are not now followed,<sup>4</sup> and others which have been explained as not bearing the meaning theretofore given them;<sup>5</sup> and it may not be quite certain what in all respects should at this day be deemed the English doctrine on our present subject. But it is clear that the general rule of the English courts, whether or not it has some slight and not very material exceptions, now accords with the American; namely, that the jurisdiction to dissolve a marriage, wherever celebrated, and for whatever cause, is with the courts of the domicile of the parties and not elsewhere.<sup>6</sup> To illustrate, —

§ 53. **Instances.** — A man whose domicile was Scotch married in England an English woman, who thereupon went to Scotland and cohabited with him. Afterward she obtained in Scotland a divorce from him for a cause not adequate by the English law. He married a second time in England, and by all the English courts, including the House of Lords, the Scotch divorce was held to be valid, and the second English marriage, therefore, to be good.<sup>7</sup> An American married an English woman in England;

<sup>1</sup> *S. v. Fleak*, 54 Iowa, 429.

<sup>2</sup> *Davis v. C.* 13 Bush, 318; *Hood v. S.* 56 Ind. 263, 26 Am. R. 21; *S. v. Armington*, 25 Minn. 29.

<sup>3</sup> *P. v. Smith*, 13 Hun, 414; *Litowich v. Litowich*, 19 Kan. 451, 27 Am. R. 145; *Smith v. Smith*, 19 Neb. 706; *Hardy v. Smith*, 136 Mass. 328, 332. See *Cost v. Cost*, 1 Utah, 112.

<sup>4</sup> For example, *McCarthy v. Decaix*, 2 Russ. & Myl. 614, cited 2 Cl. & F. 568, 3 Hag. Ec. 642, note, 5 Eng. Ec. 244, denied by the House of Lords in *Harvey v. Farnie*, 8 Ap. Cas. 43.

<sup>5</sup> For example, the much-cited *Rex v. Lolley*, Russ. & Ry. 237; s. c. nom. *Lolley*

*v. Lolley*, 2 Cl. & F. 567; explained in the House of Lords in *Harvey v. Farnie*, supra, and in various other places; post, § 177, 178.

<sup>6</sup> *Conway v. Beazley*, 3 Hag. Ec. 639, 5 Eng. Ec. 242; *Harvey v. Farnie*, supra, in its earlier stages, 5 P. D. 153, 6 P. D. 35; *Scott v. Attorney-General*, 11 P. D. 128; *Turner v. Thompson*, 13 P. D. 37; *D'Etchegoyen v. D'Etchegoyen*, 13 P. D. 132; *Argent v. Argent*, 11 Jur. n. s. 864, 34 Law J. n. s. Prob. 133; *Shaw v. Gould*, Law Rep. 3 H. L. 55.

<sup>7</sup> *Harvey v. Farnie*, 5 P. D. 153, 6 P. D. 35, 8 Ap. Cas. 43.

the parties lived together awhile there, then they went to the United States. Here she obtained from him in the District of Columbia a divorce, or rather a decree of nullity, by reason of his impotence. She returned to England, and there this decree dissolving a voidable marriage was held to be effectual.<sup>1</sup> These cases are not absolutely conclusive that the entire doctrine of the last sub-title prevails in England; because in the former the court takes cognizance of the fact that the husband was at the time of the marriage a domiciled Scotchman, and in the latter that he was a domiciled American, therefore regarding the marriage as not in the fullest sense English. Yet it is difficult to resist the conviction that if the husband had in each of these cases been an Englishman, the result would, as on principles not contradicted by the judges it should, have been the same. But this view brings us to the question of the possibility of a foreign tribunal's dissolving an English marriage, as judged of by the English law, to be considered in a subsequent chapter.<sup>2</sup> On the other hand, —

§ 54. **Jurisdiction without Domicil.** — We find in some of the English decisions more than intimations of the possibility of a jurisdiction, in special circumstances, without a domicil. Thus, —

§ 55. **Instances.** — In one case, where the marriage was Irish and the parties were domiciled in Ireland, but the wife appeared to the husband's petition in England, and did not object, thus submitting to the jurisdiction,<sup>3</sup> the court gave sentence for dissolution. Of the reasons for this, the report discloses only the following: "There was some discussion amongst the learned judges as to the jurisdiction of the court to dissolve an Irish marriage upon the facts admitted and proved, but they considered that, as the wife had submitted to the jurisdiction of the court, they might pronounce the decree prayed."<sup>4</sup> In a later and similar case, where the defending wife took the objection, the divorce was refused. Lord Penzance, having referred to an earlier decision,<sup>5</sup> said: "I shall forbear to discuss the questions whether there can or ought to be two sorts of domicil; whether a *bona fide* residence alone can in any sense be called a domicil, and whether the mere fact of residence ought or ought not to be sufficient to entitle a party to sue in this court. I will remark in passing that

<sup>1</sup> *Turner v. Thompson*, 13 P. D. 37.

<sup>2</sup> *Post*, § 177, 178.

<sup>3</sup> *Ante*, § 50; *post*, § 178.

<sup>4</sup> *Callwell v. Callwell*, 3 Swab. & T. 259, 260, 261.

<sup>5</sup> *Brodie v. Brodie*, 2 Swab. & T. 259.

when the case has been reversed, and when the courts of this country have had to consider how far persons who are domiciled Englishmen shall be bound by the decree of a foreign matrimonial court, the strong tendency has been to repudiate the power of the foreign court under such circumstances to dissolve an English marriage. It would be unfortunate if an opposite course should be followed by the courts of this country when they are determining to what extent they will entertain the matrimonial suits of foreigners.”<sup>1</sup> Still later, an English lady, married on English territory, and long and still dwelling in England in separation from her husband, who was a domiciled Frenchman, brought a suit against him for dissolution, and had him personally cited within the jurisdiction of the court in England, where he was temporarily residing. He had an appearance entered, but objected to the jurisdiction. According to the principles of our American law, she, permanently abiding in England *animo manendi*, had for divorce purposes an English domicile whereon she could maintain her jurisdiction, without taking into consideration the further fact that she was an English subject. But by what was assumed to be the English doctrine, her domicile was, for divorce, the same as for anything else, with her husband’s,<sup>2</sup>—it being, in this instance, at Paris in France. The parties had cohabited in England, where he was a French consul, and the *delictum* was mainly there, but he had never an English domicile. The Divorce Court, Sir Robert Phillimore, held that, there being no English domicile, it had no jurisdiction of the cause.<sup>3</sup> The Court of Appeal, three judges sitting, reversed the decision, two against a dissenting one. James, L. J., of the majority, deemed that there was no authority denying the jurisdiction, except American,<sup>4</sup> and this he did not regard as

<sup>1</sup> Manning v. Manning, Law Rep. 2 P. & M. 223, 226, 227.

<sup>2</sup> See the chapter beginning post, § 112.

<sup>3</sup> Niboyet v. Niboyet, 3 P. D. 52.

<sup>4</sup> What the American Doctrine is.—He stated the American doctrine to be “that the jurisdiction is to be determined by the domicile of the complaining party at the time of the complaint brought,” p. 7. This is not an accurate representation of our doctrine, especially when made, as here, with reference to general jurisprudence. True, the statutes in most of our States, adopted to prevent impositions

upon the courts by parties falsely pretending to be domiciled, require a residence by the applicant for a given number of years. But as a question of general jurisprudence, our courts do not hold such residence to be indispensable. And on the other hand, they do hold that, for divorce, a wife may have a domicile separate from her husband’s (post, § 112–127), resulting in the possibility of divorce in a State where only one of the parties is domiciled. Therefore the following altered form of the words of the learned judge would better represent the Ameri-

sound. In fact, as just stated, the American doctrine would have sustained the jurisdiction; so that, had he fully understood it, he must have accepted it as right in its conclusion, however denying its reasoning. "I do not think," he added, "that I am overruling any English case in holding that on the facts stated in this petition the wife is entitled to the relief she asks, or in laying down that where and while the matrimonial home is English, and the wrong is done here, then the English jurisdiction exists and the English law ought to be applied." Cotton, L. J., on the same side, deemed that the English Divorce Act gave the jurisdiction, and he did not consider it essential to inquire whether or not the divorce would be recognized in other countries. The dissenting opinion of Brett, L. J., assumed that there was no domicile,<sup>1</sup> and, for the rest, pro-

can doctrine in general jurisprudence,—"that, for divorce purposes, husband and wife may have separate domicils, and the jurisdiction is to be determined by the domicile of one of them, either the plaintiff or the defendant, at the time of the complaint brought." There are exceptional States in which this doctrine would not be accepted in precise form. But I have no knowledge that, as a question of general jurisprudence, the defendant's domicile has ever been denied to be as good as the plaintiff's. Post, § 139, 194. Yet this exact inquiry could seldom present itself to an American court, because of the wide prevalence of the statute mentioned.

<sup>1</sup> *Wife's Domicil for Divorce.*—I use this form of expression because such was the assumption throughout the case, and there was apparently no argument upon the question. But this learned judge said: "It is incontestable that the domicile of the wife, so long as she is a wife, is the domicile which her husband selects for himself, and at the commencement of the suit she is, *ex hypothesi*, still a wife," p. 14. In a subsequent chapter, we shall see that our courts deem the opposite to be incontestable; namely, that when a statute authorizes husband and wife to sue each other for divorce, it by necessary implication gives the needful domicile for the purpose, and puts the two on an equal footing the same as to the domicile as to the other parts of the suit. The English courts carry this doctrine into every part of the suit except domicile, per-

mitting the wife to employ and appear by counsel, bargain with her antagonist relating to the cause, and so of all the rest. For example, as to a single item in the list, in the words of Jessel, M. R.: "The moment you empower a married woman to sue or defend in her own name, you must empower her also to compromise that suit on terms which may be fairly arranged; and consequently in all those cases, whether they have or have not reference to her personal status, she must take, as an incident to the right to sue, the right to contract—to compromise that suit." *Besant v. Wood*, 12 Ch. D. 605, 622. And see Vol. I. § 1265. Surely the principle which thus gives the power of contract carries with it the right of jurisdiction for divorce. For illustration, if a husband commits in England a matrimonial offence entitling the wife to a divorce, then changes his domicile to France while she remains in England, the English Court must accord to her a separate domicile for divorce or disobey the act of Parliament. Therefore the statute must be interpreted to provide the domicile. Beyond which, it is believed that this conclusion is not contrary to the principles of general or international jurisprudence. By the law of nature, the parties are equal. Their respective rights of property and right of rule, among which is the power to fix the domicile, are regulated differently by the municipal laws of different countries. Hence, to them international jurisprudence does not descend.

ceeded on grounds which to an American lawyer would seem just in general jurisprudence. He referred to American authorities among others.<sup>1</sup>

§ 56. **Consent by Appearance.**—The doctrine of one of these English cases, that the defendant's consent to the jurisdiction will give the court an authority it would not otherwise have over the marital status of foreigners, could hardly, on reflection, be accepted as just by any tribunal. There is no difference in principle between this proposition and the proposition that the same parties may dissolve their marriage without the help of the court.<sup>2</sup>

§ 57. **Finally,**—it is believed that under no circumstances will an English court accept as valid a foreign divorce of English parties pronounced while their domicile remains English.<sup>3</sup> And in the highest reason, the same protection from foreign interference which they give to their own domiciled subjects ought to be extended to those of other nations, to the extent of declining the jurisdiction to divorce, in England, persons whose domicils are in other countries. There is ground for hope that such will ultimately become the English doctrine; the contrary, it would seem, never having been definitively adjudged by the ultimate tribunal, the House of Lords.

#### IV. *The Developments of the Doctrine in the Dominion of Canada.*

§ 58. **Domicil the Rule.**—Not many cases involving the questions we are considering have passed to adjudication in the

<sup>1</sup> Niboyet v. Niboyet, 4 P. D. 1, 7, 9, 20.

<sup>2</sup> Yet there are one or two American cases which have a sort of look like holding such a doctrine. Kinnier v. Kinnier, 58 Barb. 424. And see, in connection with this, Kerr v. Kerr, 41 N. Y. 272; Kinnier v. Kinnier, 53 Barb. 454; Kirrigan v. Kirrigan, 2 McCarter, 146. The doctrine may properly be accepted as to some collateral issues, involving, not the status, which concerns the public, but private rights of property. This matter was explained in the last chapter. Ante, § 14-24, 26, 27, 35, 36. In a Massachusetts case, Shaw, C. J. speaking indeed of a statute in affirmance of the rule of international law we are considering, but still bringing to view the principle on which these cases all ought to proceed, said:

"Nor would such a divorce be made good by the appearance of the respondent. The express provision of the statute, declaring that such divorce shall be of no force or effect in this State, is not made for the benefit of a party, which may be waived by an appearance or otherwise; but it is made upon high considerations of general public policy and public interest, the provisions of which cannot be waived. Appearance is evidence only of consent, and express consent would be of no avail." Chase v. Chase, 6 Gray, 157, 161.

<sup>3</sup> Shaw v. Gould, Law Rep. 3 H. L. 55; Briggs v. Briggs, 5 P. D. 163. And see Birt v. Boutinez, Law Rep. 1 P. & M. 487, and other cases cited to the preceding sections.

Canadian courts. But there have been a few, and they appear sufficiently to have established the rule of domicil, in general accord with the American doctrine. Thus, —

§ 59. **No Jurisdiction without Domicil.** — Where Canadian parties, married in the United States, were temporarily living in one of our States, and the husband in that State, in a proceeding in which his wife was notified but did not appear, obtained from her a divorce, the decree was held to be of no effect as a bar to her suit for alimony in the courts of their domicil in Canada. In the facts of this case, the divorcing court had been misled by untrue evidence; but the conclusion, it appears, would have been the same without this element, — the want of domicil depriving it of international jurisdiction.<sup>1</sup> On the other hand, —

§ 60. **Jurisdiction accompanies Domicil.** — Where, without fraud or collusion, a husband domiciled abroad obtained from the court of his domicil a divorce from his wife, who was living in Canada, for her adultery, notice having been served upon her in Canada, the marriage was held to be validly dissolved.<sup>2</sup> But the conclusive and every-way important case is one which was commenced in Quebec, and ultimately decided by the Canada Supreme Court. Parties had been married in New York, where both were domiciled, and had there lived together as husband and wife. Afterward they removed to Montreal, where the husband continued to reside, having never resumed his abode in New York. The wife soon left him, living alternately in Paris and New York. Some years later, he being in Montreal and she in New York, she instituted against him in the latter locality proceedings for divorce. He was personally served with process in Montreal, appeared in the suit but did not contest, and the court granted her the decree prayed. Thereupon the Superior Court held the divorce to be good in Canada, the Queen's Bench reversed the decision, and the Supreme Court of Canada reversed the Queen's Bench, — deeming, with the Superior Court, that the divorce was good. This case seems to carry with it the entire American

<sup>1</sup> *Magurn v. Magurn*, 3 Ont. 570, 11 Tupper Ont. Ap. 178. A newspaper report, kindly furnished me by a correspondent in Canada, shows that the husband applied in this case to the Privy Council in England for leave to appeal. But the application was dismissed with costs,

chiefly, as I understand the report, on the ground that the question decided by the Ontario Court was largely one of fact; namely, whether or not the American divorce was procured by fraud and collusion.

<sup>2</sup> *Guest v. Guest*, 3 Ont. 344.

doctrine, including the capacity of the wife to have a divorce domicil separate from her husband, though there is some room for qualifying distinctions under differing facts possible hereafter to arise.<sup>1</sup>

### V. *The Developments of the Doctrine in Scotland.*

§ 61. **Change.**—On the subject of the present chapter, there has been of late in Scotland a complete reversal of the former judicial opinions. Always there were Scotch judges and other legal persons to assert the rule of the domicil; but from early times down almost to the present date the majority doctrine, fluctuating perhaps in some of its details, was substantially the other way, permitting divorce on a mere temporary residence. It was so when the author wrote the first edition of his “Marriage and Divorce,” and it remained so, though with an increasing tendency toward the change, while he was preparing all the subsequent editions,—leaving it for these new commentaries to announce to the profession in the United States the change which brings Scotland into line with us. Looking for the old doctrine, —

§ 62. **Rule of Domicil asserted and overruled.**—Singularly, in former times, the lower Scotch judges saw more nearly what is now accepted as the truth than the higher. “It is very extraordinary,” said Lord Glenlee, “to bring an action in this country in order to ascertain a status to be held in another country.”<sup>2</sup>

<sup>1</sup> *Stevens v. Fisk*, decided in the Supreme Court, Jan. 12, 1885. The report of the decision before this tribunal in 8 Legal News, 42, continued 53, being on its face incomplete, I searched for the rest without success. Thereupon one of the counsel, Eugene Lafleur, Esq. of Montreal, was so good as to supply on my request the information needed. I quote from his letter: “The Chief-Justice and the dissenting judge (Strong) in the Supreme Court never handed down the opinions which they promised when judgment was rendered. The result of this neglect was that no full report of the case appeared in the regular series of reports, but only a meagre abridgment of the judge’s remarks was given in Cassels’s Supreme Court Digest under the word ‘Divorce’ at p. 134. In order that you

may have a full history of the case, I append all the references which our reports contain,—5 Leg. News, 79 (judgment of Superior Court, Torrance, J. maintaining validity of divorce); 6 Leg. News, 329 (judgment of C. Q. B. reversing judgment of S. C. by 3 to 2); 27 Lower Canada Jur. 228 (judgment of C. Q. B., a much fuller report than the preceding one); 3 Dorion’s Q. B. Rep. 293 (another report of the judgment of the C. Q. B.); 8 Leg. News, 42 and 53 (opinions of Gwynne, Henry, and Fournier, JJ. in Supreme Court); 3 Stephen’s Quebec Law Dig. 273 (brief note of judgment of Supreme Court); Cassels’s Dig. 134, above mentioned.”

<sup>2</sup> *Duntze v. Levett*, Ferg. 68, 406, 3 Eng. Ec. 360, 508. And see, of the like sort, the other opinions of the judges in



And the primary court frequently acted upon this doctrine, yet their rulings were always reversed on appeal.<sup>1</sup> The question seems not to have been conclusively determined by direct decision of the House of Lords, the tribunal of last resort;<sup>2</sup> but it was assumed, the same in the English as in the Scotch courts, that the Scotch law rejected the rule of domicile.<sup>3</sup> Nothing was ordinarily necessary to the Scotch jurisdiction but service of process on the defender. It might be by a personal citation the moment he arrived in the country,<sup>4</sup> or by a citation left at his dwelling-place after a sojourn of forty days;<sup>5</sup> though it has been said that there must be a forty days' residence in all cases where the offence was committed abroad.<sup>6</sup> The pursuer need not even have set foot in Scotland if the defender had a sufficient abiding there;<sup>7</sup> for the oath of calumny could be taken by commission.<sup>8</sup> There was also an edictal citation, competent where the pursuer lived in the country, and the defender was abroad.<sup>9</sup> At a later period, —

this case and the opinions in *Gordon v. Pye*, Ferg. 276, 327, 328, 352, 3 Eng. Ec. 430, 461, 476.

<sup>1</sup> See the several cases of *Utterton v. Tewsh*, Ferg. 23, 3 Eng. Ec. 347; *Duntze v. Levett*, Ferg. 68, 3 Eng. Ec. 360; *Butler v. Forbes*, Ferg. 209, 3 Eng. Ec. 401; *Kibblewhite v. Rowland*, Ferg. 226, 3 Eng. Ec. 406. The last-cited case is very strong. The husband, who was the defender, went from London, the place both of the marriage and of the domicile, on a pleasure excursion to Scotland, being in the country in all only six or seven weeks. He committed adultery there, and was cited by his wife, who still remained in London, in an action of divorce. Immediately on receiving the citation, he returned to London. The primary court at first declined to entertain the suit as for a divorce from the bond of matrimony, — offering, however, a divorce *a mensa et thoro*, which was refused. But a divorce *a vinculo* was ultimately decreed by order of the Court of Appeal. *Gordon v. Pye*, Ferg. 276, 3 Eng. Ec. 430. For a general review of these cases, see 2 Kent Com. 110–116; and, of these and other Scotch decisions on the same question, see *Hosack Confl. Laws*, 257–285.

<sup>2</sup> In *Warrender v. Warrender*, 2 Cl. & F. 488, 552, 556. on appeal from Scotland to the House of Lords, the Scotch law was

assumed not to require a domicile in Scotland. But the case itself was one in which there was a Scotch domicile; and the point decided was that by the law of Scotland the marriage celebrated in England might be dissolved by the Scotch courts. See also *Geils v. Geils*, 1 Macq. Ap. Cas. 255.

<sup>3</sup> For example, by *James, L. J. Niboyet v. Niboyet*, 4 P. D. 1, 7, 8.

<sup>4</sup> *Duntze v. Levett*, Ferg. 68, 3 Eng. Ec. 360; *Kibblewhite v. Rowland*, Ferg. 226, 232, 3 Eng. Ec. 406, 408; *Conway v. Beazley*, 3 Hag. Ec. 639, 3 Eng. Ec. 242, 246.

<sup>5</sup> *Duntze v. Levett*, and *Kibblewhite v. Rowland*, *supra*.

<sup>6</sup> Mr. Fraser, however, says: "Residence for forty days has nothing to do with jurisdiction in cases of divorce. The popular notion and some loose practice gave it countenance, but it is without the sanction of judicial authority." *Fras. Confl. Laws of Div.* 61.

<sup>7</sup> *Christian v. Ladd*, 13 Scotch Sess. Cas. 2d ser. 1149; *Geils v. Geils*, *supra*. See *Forrester v. Watson*, 6 Scotch Sess. Cas. 2d ser. 1358.

<sup>8</sup> *Duntze v. Levett*, Ferg. 68, 3 Eng. Ec. 360, 378; *Orde v. Murray*, 8 Scotch Sess. Cas. 2d ser. 535.

<sup>9</sup> *Wharton v. Mair*, Ferg. 250, 3 Eng. Ec. 415; *Warrender v. Warrender*, 2 Cl. & F. 488, 9 Bligh, n. s. 89.

§ 63. **Qualified.** — We find in the Scotch reports some qualifications of this extremely loose jurisdictional doctrine, — permitting the several questions of the place of the marriage, the place of the *delictum*, the domicile of the parties at the time it was committed, and the residence of each when the litigation is carried on, to be taken into the account. Thus, where the suit was between parties married and domiciled in England, and the adultery was abroad, the court refused to entertain it, though the complaining husband had been temporarily sojourning forty days in Scotland to give the jurisdiction, his wife not accompanying him thither.<sup>1</sup> And where the marriage was in Scotland, but the parties were afterward domiciled in Ireland, and there the *delictum*, which was by the wife, occurred, after which she returned to Scotland, the husband still remaining in Ireland, it was held that this husband, so residing abroad, could not have in Scotland his suit for divorce without the forty days' abiding therein.<sup>2</sup> But where a husband changed his domicile from Scotland to the United States, leaving his wife behind, and she afterward committed adultery in Scotland, the Scotch courts took jurisdiction over his divorce suit, while himself thus personally abroad. "I put my opinion," said the Lord Justice-Clerk, "upon the broad ground that this party, having left his wife in Scotland — I do not say it would be different if he had sent her here, or if she had left him — finds that in his absence she, resident in Scotland, has committed adultery in this country; and I hold that the husband has the undoubted right to proceed against her in such a state of facts, in the courts of this country; and I lay aside all consideration of his alleged domicile in America as wholly immaterial. Nor do I think his right could be excluded, although he might, by reason of such domicile, have proceeded against her in New York. The fact that she is in Scotland, and has committed adultery here, gives the husband in this case right to prosecute for dissolution of the Scotch marriage."<sup>3</sup> This decision is probably sound

<sup>1</sup> *Ringer v. Churchill*, 2 Scotch Sess. Cas. 2d ser. 307. Otherwise, where the marriage and adultery were in Scotland, and both the parties were there, though neither of them domiciled. *Shaw v. Glassford*, 13 Scotch Sess. Cas. 2d ser. 819.

<sup>2</sup> *Bennie v. Christy*, 11 Scotch Sess. Cas. 2d ser. 1211.

<sup>3</sup> *Shields v. Beattie*, 15 Scotch Sess. Cas. 2d ser. 142, 146. And see further on this subject, *Forrester v. Watson*, 6 Scotch Sess. Cas. 2d ser. 1358; *Christian v. Ladd*, 13 Scotch Sess. Cas. 2d ser. 1149; *Geils v. Geils*, 1 Macq. Ap. Cas. 255. Mr. Fraser says: "I am not aware of any case which has ever found that if a for-

within the principles of general jurisprudence as maintained in the United States, though the statutes of most of our States would exclude the jurisdiction because of the non-residence of the applicant.<sup>1</sup> According to American law, which permits husband and wife to have separate domicils for divorce, the husband sought his remedy at the place of the wife's domicil, which, equally with his own, would sustain the jurisdiction. At last, as already said, —

§ 64. **Rule of Domicil established.** — The Scotch courts have fully established the rule of the domicil, — discarding, it appears, all their former adverse doctrines. The result is a signal triumph of the erect and deathless soul of law over an inert and worn-out body of ill-considered decisions. So that, in the language of the Lord Ordinary, not perhaps in every word well chosen, but sufficiently plain and significant, “it has come to be authoritatively settled that the jurisdiction of the court in actions of divorce is founded on the domicil of the spouses; because a divorce is a proceeding which affects the status of the spouses, and ought only to be granted by a judge who has universal jurisdiction over the parties.”<sup>2</sup> To illustrate, —

§ 65. **Instances.** — A Canadian, having married in Canada, was there deserted by his wife. Thereupon he removed to Scotland and established himself in business *animo manendi*. He sued her for divorce, she appeared and defended, and it was decided that the court had jurisdiction. The judges deemed that the question of domicil was the material one. “If,” said Lord Young, “I could think the pursuer was making a mere pretence in having adopted Scotland as his home, that he had come here merely as a visitor in order to invoke the Scotch law against his wife, and that having achieved that end he intended to return

eigner commit adultery abroad, then come to Scotland and there remain for forty days, his foreign wife, who had never appeared in Scotland, could sue a divorce against him. Such a rule as this would be utterly indefensible, and such a rule is without support from Scottish decisions.” *Fras. Conf. Laws of Divorce*, 61.

<sup>1</sup> Ante, § 55, note; post, § 139.

<sup>2</sup> *Redding v. Redding*, 15 Scotch Sess. Cas. 4th ser. 1102, 1103, note. The breaking away from the old doctrine was not altogether complete and assured at first, but the beginning appears to be traceable

to *Jack v. Jack*, 24 Scotch Sess. Cas. 2d ser. 467, decided in 1862, followed by *Pitt v. Pitt*, 4 Macq. Ap. Cas. 627, decided in the House of Lords in 1864. The report in Macqueen has an appendix extending to p. 710, containing foreign decisions and other important matter on the subject. The later and conclusive cases before the Court of Session are *Redding v. Redding*, above; *Carswell v. Carswell*, 8 Scotch Sess. Cas. 4th ser. 901; *Stavert v. Stavert*, 9 Scotch Sess. Cas. 4th ser. 519; and *Steel v. Steel*, 15 Scotch Sess. Cas. 4th ser. 896.

to the country which, *ex hypothesi*, had never ceased to be his home, I should not entertain his action for a moment. But I am satisfied upon the evidence here that the pursuer, in the exercise of his undoubted liberty and legal right, has adopted Scotland and made it his home, and that there is no fraud in the matter at all. And I think so none the less that I think it is extremely likely — indeed, I should think it quite certain — that if his wife had made his home a happy one in Canada he never would have left it. We may even consider it quite certain that he has made Scotland his home because he prefers the law which in that view would govern his domestic relations, and enable him to be free of the woman who has maliciously and perseveringly deserted him,<sup>1</sup> and who, according to the evidence before us, evidently had the intention of taking up with anybody she met with and thought a nice person to live with.”<sup>2</sup> There is a case wherein the Lord Ordinary refused a divorce under circumstances similar to the above, because the wife was the applicant, and he deemed that she could not have a domicil separate from her husband’s,<sup>3</sup> — a doctrine which most of our American courts would repudiate as to the point of the wife’s capacity, but it forcibly illustrates the common rule of the domicil. In another case, a husband who was married and by his wife deserted in England, whereupon he established himself in Scotland, satisfied the court that in matter of evidence he had never lost his Scotch domicil, so it entertained jurisdiction of his suit for divorce.<sup>4</sup> Where a man, domiciled in England, deserted there his wife and went abroad with a paramour, then came to Scotland and lived with her five months, not intending to make Scotland his home, the Scotch Court declined jurisdiction of his wife’s suit for divorce, because the rule requiring domicil was not satisfied.<sup>5</sup>

#### VI. *To what Classes of Cases this Doctrine of the Domicil is applied.*

§ 66. **Not much considered.** — The subject of this sub-title appears not to have received very much thoughtful examination from the judges. All sorts of contradictory views have been

<sup>1</sup> Post, § 101.

<sup>4</sup> Steel v. Steel, 15 Scotch Sess. Cas.

<sup>2</sup> Carswell v. Carswell, 8 Scotch Sess. 896.

Cas. 4th ser. 901, 910.

<sup>5</sup> Stavert v. Stavert, 9 Scotch Sess. Cas.

<sup>3</sup> Redding v. Redding, 15 Scotch Sess. 4th ser. 519.

Cas. 4th ser. 1102.

assumed rather than judicially held, while the just distinctions have been rather overlooked than rejected, — “not thought of.”<sup>1</sup> So that it becomes here the duty of writer and reader to “think,” and thus endeavor to discover the true lines of doctrine.

§ 67. **All Questions of Marriage Status** — are within the reasons of the distinction which makes domicile essential to divorce jurisdiction, yet not as to the enforcement of property rights and duties. In practice, therefore in the books of reports, the more numerous cases are those which involve the dissolution of a valid marriage. But suits for nullity, for modifying the status, and for establishing contested marriages, are within the same reason, therefore are governed by the same rule of domicile.<sup>2</sup> Such is believed to be the true doctrine, which is more or less obscured, and more or less made clear, in our books. To particularize and explain, —

§ 68. **Bed and Board.** — Various judges who, in Scotland, during the period of darkness there,<sup>3</sup> objected to dissolving marriage without a domicile were willing to grant the divorce *a mensa et thoro*.<sup>4</sup> But the author is not aware that this view was ever acted upon. The object of the bed-and-board suit is twofold; namely, a modification of the marriage status of the parties, and the enforcement of alimony by the wife against the husband. As to the status, her purpose being, in the words of a learned judge, to free herself “*in part* from the obligation of marriage,”<sup>5</sup> the case is within the reason which requires a domicile; as to the alimony, it is not, though we shall see that it is subject to special considerations, added to which, it requires citation of the defendant husband or his appearance to bind him.<sup>6</sup> A jurisdiction simply to modify the status will in practice seldom or never be sought; as to the enforcement of alimony, the special considerations are, —

§ 69. **Alimony depending on Divorce.** — There is a question of divided opinion about alimony, explained in the first volume, and it is essential in the present connection. If, according to what is there laid down as the better doctrine, alimony has no separate

<sup>1</sup> Ante, § 28. And see Vol. I. § 847.

<sup>2</sup> Ante, § 32, 39.

<sup>3</sup> Ante, § 61–65.

<sup>4</sup> Duntze v. Levett, Ferg. 68, 3 Eng. Ec. 360; Butler v. Forbes, Ferg. 209, 3 Eng. Ec. 401; Kibblewhite v. Rowland,

Ferg. 226, 3 Eng. Ec. 406; Jack v. Jack, 24 Scotch Sess. Cas. 2d ser. 467.

<sup>5</sup> Firebrace v. Firebrace, 4 P. D. 63, 68.

<sup>6</sup> Ante, § 19, 20, 23, 25–27, 32, 35, 36, 39.

existence, but is only a mere incident or appendage in a divorce suit,<sup>1</sup> the direct foundation whereof is the modification or destruction of the status of the marriage, plainly, since there is no jurisdiction over the status without a domicile, there is none over this accompaniment in a divorce suit. Even —

§ 70. **Not depending on Divorce.** — Where, in Maryland, a statute allowed suit for alimony without divorce,<sup>2</sup> and neither party resided in the State, but the husband had property therein,<sup>3</sup> the court refused to entertain jurisdiction over the wife's alimony suit, not on the ground that alimony was an incident of divorce, but it was an incident of the marriage status, over which Maryland had no jurisdiction in the case of these foreign parties. Said Grason, J.: Alimony "is an incident of the marriage and is a right entirely depending upon the status of the parties, and each State has the right to determine the status and condition of those who are domiciled within its limits. The courts of this State have, therefore, no jurisdiction to pass upon and determine the relative duties of husband and wife both of whom are residents of another State, and the legislature never intended to confer such power by the passage of the act of 1777, nor by the adoption of the Code."<sup>4</sup> It is observable that in this case the parties were not even temporarily abiding in Maryland. If a husband and wife are sojourning in a State without a domicile, the laws requiring him to support her the same as though they were citizens, there is ground for deeming that the result should be different. It seems to have been assumed in England that, though the Scotch courts cannot dissolve the bonds of an English marriage without a domicile in Scotland, they may perhaps render a valid sentence of divorce from bed and board.<sup>5</sup> And it is not impossible our courts might take a jurisdiction of this sort, where there was a permanent residence in the State short of a domicile; certainly they would not, if the parties were merely transient. The compelling of a husband to support his wife while he abides in the State is a different thing from changing his status for another jurisdiction. Still, —

§ 71. **Limit of Doctrine.** — Assuming the right to decree ali-

<sup>1</sup> Vol. I. § 1388, 1393-1401.

<sup>2</sup> Vol. I. § 1396.

<sup>3</sup> For the effect of this circumstance in other cases than divorce, see *Pennoyer v. Neff*, 95 U. S. 714.

<sup>4</sup> *Keerl v. Keerl*, 34 Md. 21, 26. See

Vol. I. § 1412.

<sup>5</sup> *Dolphin v. Robins*, 7 H. L. Cas. 390, 414, 5 Jur. N. S. 1271.

mony on a temporary residence, the judgment of the court ought in reason to be construed as limited to the time during which such residence shall continue. Indeed, alimony without divorce is in its nature temporary, and liable to be terminated at any time.<sup>1</sup> Nor can we imagine that a foreign court, having the power to compel the husband to support his wife while the two are within reach of its process, has internationally a jurisdiction to go further, and determine how he shall support her when they return home. Accordingly it was deemed in Alabama that a South Carolina decree for alimony without divorce was good only for what was due down to the time when a divorce was rendered in Alabama.<sup>2</sup>

§ 72. **A Judgment for Alimony** — is still another and different thing. Though the *delictum* on which it was founded was not within the jurisdiction of a court other than the one rendering it, as a judgment it may be obligatory in other tribunals.<sup>3</sup> But the particulars of this doctrine are not for the present chapter.

§ 73. **Nullity Suit.** — A suit to declare a marriage void from the beginning concerns the marriage status precisely like one to break the marriage bond for a postnuptial *delictum*. Therefore it may and should be carried on in the courts of the domicil.<sup>4</sup> Thus, —

§ 74. **Instances.** — By the law of Wurtemberg, a citizen, even while abroad, could contract marriage only by the consent of the king. A couple came thence to Illinois, and there without the king's consent entered into a marriage which was valid by the Illinois law.<sup>5</sup> Afterward they returned to and became again domiciled in Wurtemberg, and the proper court of this domicil declared the Illinois marriage to be void. The husband then died, leaving real estate in Illinois; and the Illinois Court held that by reason of the Wurtemberg divorce, the marriage must be deemed in Illinois to have terminated, and with it the wife's interest in the Illinois land.<sup>6</sup> Parties were married in England,

<sup>1</sup> Vol. I. § 1417-1420.

<sup>2</sup> *Harrison v. Harrison*, 20 Ala. 629, 56 Am. D. 227.

<sup>3</sup> *Barber v. Barber*, 21 How. U. S. 582; *Stewart v. Stewart*, 27 W. Va. 167.

<sup>4</sup> Ante, § 67.

<sup>5</sup> Vol. I. § 847-849, 851, 852.

<sup>6</sup> *Roth v. Roth*, 104 Ill. 35, 44 Am. R. 81. The Supreme Court of the United

States had no jurisdiction to review this decision. *Roth v. Ehman*, 107 U. S. 319. This case is admirable in illustration of the entire doctrine of the present chapter. It was hardly fought on the losing side, and the ultimate opinion of the higher court was not quite unanimous. Naturally enough, the judgment of the Wurtemberg tribunal seemed at the first

then were domiciled in the United States; and, on the woman returning to England, her marriage was there held to have been lawfully annulled by sentence of the court in the District of Columbia, it having been originally voidable by reason of the husband's impotence.<sup>1</sup>

§ 75. *The Doctrine of this Chapter restated.*

In the progress of civilization, States come more and more into unity,—travelling toward the period when One Court of International Law shall settle all controversies between them, and war and its immeasurable woes shall be banished from the earth. Marriage and divorce pertain to the international law, and when this law has its full sway, there will be no parties judicially held to be married, or held to be divorced, in one country and not in another. Contributing toward this desirable consummation, courts that are not trammelled by statutes recognize a jurisdiction for divorce in the country of the domicil of a married party and not

impression to be an intermeddling with the Illinois law. And on the general principles which internationally govern marriage, it was wrong. And it was justifiable only as an obedience to the behest of the domestic law, which itself was an interference with the internationally recognized comity of States. So that the Illinois Court might almost have been pardoned if it had offset the Wurtemberg wrong by a wrong of its own. It would have been, in a familiar form of expression, "human nature" to have done so. That it did not, but followed the law of nations and of the land, instead of a "human" limping without law, redounds greatly to its honor. I will add a brief extract from the opinion of Mulkey, J. in this case: "Nor does it follow that the status or relation created by the marriage could only be annulled by our own courts, or that it could only be annulled by other courts for such causes as would be recognized as sufficient for that purpose under our own laws. When the parties returned to Wurtemberg and acquired a new domicil there, so far as their personal rights and relations are concerned our laws and government ceased to have any power over them or concern with

them. Personally the State had no claims on them, and they owed it no allegiance or duty. Whether the kingdom of Wurtemberg, on their return and acquiring a new domicil there, would recognize the status or relation which they had contracted here, depended upon its own laws, and not upon ours. That kingdom, in 1808, adopted an ordinance or law, which was in full force at the time of the marriage in Chicago, declaring all such marriages in a foreign State, without the license of the sovereign, absolutely null and void. It was, therefore, according to the general current of authority on the subject, entirely competent for the courts of that kingdom having jurisdiction of such matters to give effect to that law by annulling and setting aside the marriage, upon a proper application for that purpose, which was done in this case." p. 44, 45.

<sup>1</sup> *Turner v. Thompson*, 13 P. D. 37. For the convenience of the reader, I refer to *Cumington v. Belchertown*, 149 Mass. 223. The opinion of the learned judge is open to some observation, and there are points upon which the case might or might not rest, but they are not relevant to my text.



elsewhere, — this being the only possible rule conducting to harmony. The English tribunals were a little slow in coming to this conclusion, and there is some ground to argue that they have not fully reached it yet. The Scotch courts during a long series of years rejected it, but now they have embraced it, apparently in full. In the United States there has been less dissent from it than in the mother country, and for a considerable number of years it has been the established doctrine of our tribunals. Thus we are going onward and upward toward a better light and a perfected jurisprudence.

## CHAPTER III.

## THE JURISDICTION FROM CITATION OR APPEARANCE.

§ 76. **Over Subject-Matter.**—It is within explanations already made to say, that without authority over the subject-matter of a controversy there is no jurisdiction; and, on the other hand, with such authority there is an interstate jurisdiction whether there can be notice to the opposing party or not; while yet the laws of the particular State of the court may not, or they may, confer on it the power to act in the premises.<sup>1</sup> The subject-matter may be a personal thing, which the parties carry about with them, so that jurisdiction is acquired by notice to the defendant or his appearance in court, not otherwise; or it may be a status or other *res*, and then the only object of notice is to promote openness, an opportunity to come in and defend the *res*, and the avoidance of fraud.<sup>2</sup> The former sort of jurisdiction over matrimonial causes was considered in the last chapter, the latter is for this one. As to which,—

§ 77. **Doctrine defined.**—In controversies not of status or otherwise *in rem*, no court has the international jurisdiction from the mere coming in of the plaintiff; either the defendant must also appear, or notice must have been duly served upon him.<sup>3</sup> And

<sup>1</sup> Ante, § 4, 5, 14 et seq.; Maguire v. Maguire, 7 Dana, 181, 183; Watkins v. Holman, 16 Pet. 25.

<sup>2</sup> Ante, § 14-27; Holt v. Alloway, 2 Blackf. 108.

<sup>3</sup> Redus v. Burnett, 59 Tex. 576; Woodward v. Tremere, 6 Pick. 354; Hoxie v. Wright, 2 Vt. 263, 269; Aldrich v. Kinney, 4 Conn. 380, 10 Am. D. 151; Dennison v. Hyde, 6 Conn. 508; Wheeler v. Raymond, 8 Cow. 311; Shumway v. Stillman, 6 Wend. 447, 4 Cow. 292, 15 Am. D. 374; Spencer v. Brockway, 1 Ohio, 259, 13 Am. D. 615; Miller v. Miller, 1 Bailey, 242;

Williams v. Preston, 3 J. J. Mar. 600, 20 Am. D. 179; Overstreet v. Shannon, 1 Misso. 529; Sallee v. Hays, 3 Misso. 116; Starbuck v. Murray, 5 Wend. 148, 21 Am. D. 172; Holbrook v. Murray, 5 Wend. 161; Robinson v. Ward, 8 Johns. 86, 5 Am. D. 327; Gleason v. Dodd, 4 Met. 333; Pritchett v. Clark, 3 Harring. Del. 517; Wood v. Watkinson, 17 Conn. 500, 44 Am. D. 562; Davidson v. Sharpe, 6 Ire. 14; Winston v. Taylor, 28 Mo. 82, 75 Am. D. 112; Smith v. S. 13 Sm. & M. 140; Wort v. Finley, 8 Blackf. 335.

where the suit pertains to a status or other *res*, and jurisdiction has been obtained without notice in fact to the individual in interest, the authority of the tribunal is no broader than the thing; no personal judgment can be rendered and made valid against a defendant who has neither appeared nor had actual notice of the proceeding.<sup>1</sup> So that, as most matrimonial suits are both *in personam* and *in rem*,<sup>2</sup> the jurisdiction from domicile alone, considered in the last chapter, is necessarily imperfect. And in practice it is prudent to add that of the present chapter in all cases wherein it is possible. To particularize, —

§ 78. **Limit of Domicil Jurisdiction.** — The jurisdiction over a marriage or divorce cause, arising simply from domicile, where the court has obtained no control over the person of the defendant, extends only to the setting up, the nullifying, the modifying, or the dissolving of the marriage status.<sup>3</sup> This doctrine, distinguishing between the authority to affect or change the status, and to order money payments, transfers of property, and the like, from one party to the other, has been long recognized by the courts, so that while it is just in principle, it is established also in adjudication.<sup>4</sup> The only questions open to controversy relate to the classifications of some particular things. As to —

§ 79. **Alimony,** — it exists only by judicial decree. Therefore by all opinions it cannot be validly awarded in a mere *ex parte* divorce suit *in rem*, where the non-appearing defendant's domicile is in another State.<sup>5</sup> If he dwells in the same State, a statute may, according to an Indiana case, authorize a decree for alimony against him on constructive notice. If in another State, it can-

<sup>1</sup> Story Conf. Laws, § 592 *a*; Penoyer v. Neff, 95 U. S. 714; Cooper v. Reynolds, 10 Wal. 308; Chamberlain v. Faris, 1 Misso. 517, 14 Am. D. 304; Pawling v. Bird, 13 Johns 192; Steel v. Smith, 7 Watts & S. 447; Feltus v. Starke, 12 La. An. 798; Arndt v. Arndt, 15 Ohio, 33; Johnson v. Holley, 27 Mo. 594; Young v. Ross, 11 Fost. N. H. 201; Downer v. Shaw, 2 Fost. N. H. 277; Boswell v. Otis, 9 How. U. S. 336; The Globe, 2 Blatch. 427.

<sup>2</sup> Ante, § 23.

<sup>3</sup> Ante, § 43, 44, 67, 69, 73; Garner v. Garner, 56 Md. 127; Bunnell v. Bunnell, 25 Fed. Rep. 214; Harding v. Alden, 9 Greenl. 140, 151, 23 Am. D. 549. "No

State or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural-born subjects or others." Story Conf. Laws, § 20.

<sup>4</sup> Ib.; Vol. I. § 15, 1463-1470; Maguire v. Maguire, 7 Dana, 181; Holmes v. Holmes, 4 Barb. 295, 301; Crane v. Meginnis, 1 Gill & J. 463, 19 Am. D. 237; Townsend v. Griffin, 4 Harring. Del. 440; Colliss v. Hector, Law Rep. 19 Eq. 334, 341.

<sup>5</sup> Vol. I. § 1464; ante, § 35, 36, 68; Prosser v. Warner, 47 Vt. 667, 19 Am. R. 132; Lytle v. Lytle, 48 Ind. 200; Middleworth v. McDowell, 49 Ind. 386.

not; except when he appears and submits to the jurisdiction, then it can.<sup>1</sup> Some considerations regarding alimony without divorce were presented in the last chapter.<sup>2</sup> Again,—

§ 80. **Prohibiting Remarriage.** — If the court has a jurisdiction to prohibit divorced defendants from remarrying, it cannot be exercised against a non-domiciled one who does not appear in the suit. As to which, Robinson, J., observed: “All the cases which recognize the jurisdiction of a State to determine the matrimonial status of its own citizens, although one of the parties live in another State, limit the exercise of it to the dissolution of the marriage. The decree in such cases affects only the status or marriage relation. To go one step further and say the guilty party who is a non-resident, and therefore beyond the process of the court, shall not marry again, is quite a different thing. Such a prohibition is not necessarily a part of the decree dissolving the marriage, but in the nature of a decree *in personam*, affecting the rights of parties beyond the jurisdiction of the court.”<sup>3</sup>

§ 81. **Appearance.** — In these cases, and in all others governed by the like reasons, a voluntary appearance by the defendant, or the citation of him when found within the territorial limits of the court, lets in the jurisdiction *in personam*, and then the personal judgment, which would otherwise be incompetent, may be rendered against him.<sup>4</sup>

§ 82. **Dower — Custody of Children — Costs, &c.** — In their proper places further on, will be explained various questions concerning the effect of the doctrines of this chapter upon dower, the custody of children, costs, and some other things. To make the doctrine itself plain, rather than to define its exact limits, is the purpose of the present elucidations.

### § 83. *The Doctrine of this Chapter restated.*

Jurisdiction is the authority of the court to do the thing asked. There can be no valid judgment without a jurisdiction. Where a matrimonial court has by the law of its State the power to determine a particular sort of cause, it has internationally a jurisdiction over it as respects the status of marriage, if one of the parties or

<sup>1</sup> Beard v. Beard, 21 Ind. 321; Bunnell v. Bunnell, 25 Fed. Rep. 214.

<sup>2</sup> Ante, § 69-71.

<sup>3</sup> Garner v. Garner, 56 Md. 127, 128, 129.

<sup>4</sup> Sanford v. Sanford, 5 Day, 353; Jones v. Jones, 108 N. Y. 415.

both of them are domiciled within reach of its process. But beyond the marriage status, when any decree is prayed affecting property, or otherwise affecting personal rights and duties, it has, in interstate law, a jurisdiction only if the defendant is either served with process or appears. Most matrimonial suits have within their sphere both the status and the collaterals. If, in a particular case, there is the needful domicil, but not the service of process or an appearance, the judgment of the court can validly determine the question of status, yet not the rest.

## CHAPTER IV.

## DOMICIL IN DIVORCE LAW.

- § 84-86. Introduction.
- 87-95. Generally of Domicil.
- 96-105. Specially in Divorce Law.
- 106-110. "Residence" distinguished.
- 111. Doctrine of Chapter restated.

§ 84. **Relations of Subject.** — Under several titles of our law other than divorce, the question of domicil is important. Therefore marriage and divorce causes are not exclusively those from which we are to derive juridical illumination for the present chapter. And still, —

§ 85. **Latitude in Meaning of "Domicil."** — Like all other words legal and non-legal, "domicil" is not absolutely exact and without variations in meaning. The subject or title of the law in which it is employed, its connection in a sentence, the surroundings of the party speaking, and views special to the particular court, may work their several modifications; so that there are some uncertainties as to what is a domicil for divorce, and whether and how far it differs from residence. Hence, —

§ 86. **How Chapter divided.** — We shall consider, I. Generally of Domicil; II. Specially in Divorce Law; III. Whether or how "Residence" for Divorce is distinguishable from Domicil therefor.

I. *Generally of Domicil.*

§ 87. **Defined.** — Domicil, as to one acting in his own right, is the place which of choice he has occupied for permanent abode, to which when deeming himself absent from home he intends to return; and which, if he has resolved to change it, remains his domicil in law until he has reached the new locality wherein he intends permanently to dwell. As to one whose home is, like a married woman's or minor's in ordinary circumstances, determined in

law by another who is the head of the family, it is the place which the other has selected and occupied for the family habitation.<sup>1</sup> This defining will be made more clear and definite by a —

§ 88. **Fuller Description.** — Domicil is the place in which, both in fact and intent, the home of a person is established, without any purpose to return to a former home;<sup>2</sup> the place where he lives, in distinction from that where he transacts his business;<sup>3</sup> the place where he chooses to abide, in distinction from that in which he may be for a temporary purpose;<sup>4</sup> the place which he has chosen, in distinction from one to which he may be exiled<sup>5</sup> or sent a prisoner<sup>6</sup> or, being in the government service, to which he is ordered;<sup>7</sup> if he is entitled in law to elect where to reside,

<sup>1</sup> **Other Definitions.** — The books have various definitions of domicil. The following, selected from the Roman law, has been approved: "In whatsoever place an individual has set up his household gods, and made the chief seat of his affairs and interests, from which, without some special avocation, he has no intention of departing; from which, when he has departed, he is considered to be from home; and to which, when he has returned, he is considered to have returned home: in this place, there is no doubt whatever, he has his domicil." Phillim. Dom. 11. Story says that by the term is ordinarily meant "the place where a person lives or has his home." Story Conf. Laws, § 41. A neat form of the definition, adopted in some late cases, is, we have seen, that domicil is the place where the person has fixed his habitation without any present intention of removing therefrom. Vol. I. § 1703, note. Now, —

**Further of the Definition.** — Jacobs, in a late work on Domicil, has a great collection of definitions. Jacobs Dom. § 57-77. And he quotes various expressions from our books to the effect that the word as employed in our law is extremely difficult or even impossible of defining. Whether or not the learned persons cited by him were correct in this view is matter of opinion. I crave no part of the praise bestowed on some other authors for their prudence in not venturing upon definition here. We have seen that in the law a definition is legal doctrine epitomized. Vol. I. § 12. A question of domicil is a

mixed one of law and fact. And I cannot discover that the law of domicil is more difficult than that of some other things. If it were, I do not see that the difficulty of a topic should be ground for praise to an author who dodges it. To my apprehension, the clearing up of difficulties is the prime function of a properly written commentary on any department of the law.

<sup>2</sup> *Leach v. Pillsbury*, 15 N. H. 137; *Plummer v. Brandon*, 5 Ire. Eq. 190; *Horne v. Horne*, 9 Ire. 99; *Hardy v. De Leon*, 5 Tex. 211; *Thorndike v. Boston*, 1 Met. 242; *Wilton v. Falmouth*, 15 Me. 479; *Putnam v. Johnson*, 10 Mass. 488; *Graham v. Public Administrator*, 4 Bradf. 127; *Hairston v. Hairston*, 27 Missis. 704, 61 Am. D. 530; *Dalhousie v. McDouall*, 7 Cl. & F. 817; *Ex parte Kenyon*, 5 Dil. 385; *King v. Foxwell*, 3 Ch. D. 518; *Hegeman v. Fox*, 31 Barb. 475.

<sup>3</sup> *Catlin v. Gladding*, 4 Mason, 308.

<sup>4</sup> *Hodgson v. De Beauchesne*, 12 Moore P. C. 285; *Hoskins v. Matthews*, 8 De G. M. & G. 13; *In re Rice*, 7 Daly, 22; *Babcock v. Cass*, 65 Iowa, 110.

<sup>5</sup> *In Goods of D'Orleans*, 1 Swab. & T. 253; *White v. Burnley*, 20 How. U. S. 235.

<sup>6</sup> *Barton v. Barton*, 74 Ga. 761.

<sup>7</sup> *Brown v. Smith*, 15 Beav. 444; *Hodgson v. De Beauchesne*, 12 Moore P. C. 285; *Yelverton v. Yelverton*, 1 Swab. & T. 574; *Attorney-General v. Rowe*, 1 H. & C. 31; *Wood v. Fitzgerald*, 3 Or. 568; *Attorney-General v. Napier*, 6 Exch. 217; *In re Macreight*, 30 Ch. D. 165; *S. v. Grizzard*, 89 N. C. 115.

it is the place which he has himself selected, in distinction from any which another may have selected for him; if an infant or a married woman, it is the place which the husband or father has ordained, in distinction from that of the person's own choice;<sup>1</sup> it is ordinarily, in the case of the wife, the place where the husband has his domicile;<sup>2</sup> every individual has a domicile;<sup>3</sup> no person has more domicils than one;<sup>4</sup> it is the place which the fact and the intent, combining with each other and with the law, gravitate to and centre in, as the home.

§ 89. **Change of Domicil.**—A change of domicile is effected by an actual removal to the new locality with the intent to remain. But whatever the intent, the new domicile is not acquired until the new residence is entered upon by the personal presence; and so long as either such presence is wanting, or the intent to remain is not fully formed, the old domicile continues.<sup>5</sup>

§ 90. **Whether two Domicils.**—Phillimore puts the question,—

<sup>1</sup> *Porterfield v. Augusta*, 67 Me. 556; *Lacy v. Williams*, 27 Mo. 280; *Brown v. Lynch*, 2 Bradf. 214; *Greene v. Greene*, 11 Pick. 410; *Hiestand v. Kuns*, 8 Blackf. 345, 46 Am. D. 481; *Walcot v. Botfield*, *Kay*, 534; *Mears v. Sinclair*, 1 W. Va. 185; *In re Rice*, 7 Daly, 22; *Kennedy v. Ryall*, 67 N. Y. 379, 386. And see *Holyoke v. Haskins*, 5 Pick. 20, 16 Am. D. 372; *Allen v. Thomason*, 11 Humph. 536, 54 Am. D. 55; *Kelly v. Garrett*, 67 Ala. 304.

<sup>2</sup> Vol. I. § 1714; post, § 112; *Sanderson v. Ralston*, 20 La. An. 312.

<sup>3</sup> *Abington v. North Bridgewater*, 23 Pick. 170; *Kellogg v. Winnebago*, 42 Wis. 97.

<sup>4</sup> Post, § 90.

<sup>5</sup> *Fayette v. Livermore*, 62 Me. 229; *Ringgold v. Barley*, 5 Md. 186, 59 Am. D. 107; *Barrett v. Black*, 25 Ga. 151; *Smith v. Croom*, 7 Fla. 81; *Henrietta v. Oxford*, 2 Ohio St. 32; *Brewer v. Linnæus*, 36 Me. 428; *Hood's Estate*, 21 Pa. 106; *Isham v. Gibbons*, 1 Bradf. 69; *Clark v. Likens*, 2 Dutcher, 207; *Boyd v. Beck*, 29 Ala. 703; *Layne v. Pardee*, 2 Swan, Tenn. 232; *The Friendschaft*, 3 Wheat. 14; *Miller's Estate*, 3 Rawle, 312, 24 Am. D. 345; *The Nereide*, 9 Cranch, 388; *In re Wrigley*, 8 Wend. 134; *Jennison v. Hapgood*, 10 Pick. 77; *Cambridge v. Charlestown*, 13 Mass. 501; *Sacket's Case*, 1 Mass. 58; *Abington v. Boston*, 4 Mass. 312; *C. v.*

*Walker*, 4 Mass. 556; *Granby v. Amherst*, 7 Mass. 1; *Lincoln v. Hapgood*, 11 Mass. 350; *Williams v. Whiting*, 11 Mass. 424; *Harvard College v. Gore*, 5 Pick. 370; *Knox v. Waldoborough*, 3 Greenl. 455; *Parsonsfeld v. Kennebunkport*, 4 Greenl. 47; *Hollowell v. Saco*, 5 Greenl. 143; *Cadwalader v. Howell*, 3 Harrison, 138; *Thorndike v. Boston*, 1 Met. 242; *Sears v. Boston*, 1 Met. 250; *S. v. Hallett*, 8 Ala. 159; *S. v. The Judge*, 13 Ala. 805; *Glover v. Glover*, 18 Ala. 367; *Horne v. Horne*, 9 Ire. 99; *White v. Brown*, 1 Wal. Jr. 217; *Crawford v. Wilson*, 4 Barb. 504; *Munroe v. Douglas*, 5 Madd. 379; *Brown v. Smith*, 15 Beav. 444; *Jopp v. Wood*, 34 Beav. 88; *Hodgson v. De Beauchesne*, 12 Moore P. C. 285; *Moorhouse v. Lord*, 10 H. L. Cas. 272; *In Goods of Raffanel*, 3 Swab. & T. 49; *Desmare v. U. S.* 93 U. S. 605; *Carey's Appeal*, 75 Pa. 201; *Kellogg v. Winnebago*, 42 Wis. 97; *Ross v. Ross*, 103 Mass. 575; *Hampden v. Levant*, 59 Me. 557; *Walker v. Walker*, 1 Mo. Ap. 404; *Hindman's Appeal*, 85 Pa. 466; *King v. Foxwell*, 3 Ch. D. 518; *Doucet v. Geoghegan*, 9 Ch. D. 441; *Bangs v. Brewster*, 111 Mass. 382; *Chalmers v. Wingfield*, 36 Ch. D. 400. But see *North Yarmouth v. West Gardiner*, 58 Me. 207, 4 Am. R. 279; *McIntyre v. Chappel*, 4 Tex. 187.



"Can a man have two domicils?" and adds: "The Roman law answered in the affirmative,—that is, when a man has so set up his household gods in both places as to appear equally established in both,—and this answer, properly understood and qualified, is not incorrect with reference to the international law of the present day."<sup>1</sup> Now, we shall see further on that a man may have his domicil in one place while for inferior or temporary purposes he resides in another. And there is a sort of *quasi* domicil which, while it may, on the one hand, be in a different place from the real one, is, on the other hand, taken for certain purposes to be the domicil. But the idea that in any other sense, one may have two domicils—if two, then two hundred as well—is contrary to modern notions, modern habits, and modern civilization. A wandering Arab may perhaps have two domicils; but where men are attached to localities, each man, though he may be in several localities at different times, and perhaps during different parts of the same day, must be presumed to have chosen one of them as his home, the same as when he is married and associates with more women than one, he is in law presumed to have selected only one of them as his wife. "Every person," said Shaw, C. J., "must have a domicil somewhere; and a man can have only one domicil, for one purpose, at one and the same time."<sup>2</sup> And this, it is submitted, is the sounder doctrine. Again, as here intimated,—

§ 91. **Different Domicils for Different Purposes.**—It is commonly said that there may be different domicils for different purposes; or, as expressed by Cresswell, J., "that the word 'domicil' has many meanings, according as it is used with reference to succession, or for determining rights of belligerents, or ascertaining trading privileges."<sup>3</sup> If this is strictly so, there can be no one definition of the word "domicil," as most judges and text-writers have assumed there may be; but there are as many differing definitions as there are subjects to which the law of domicil is applied. The better statement of the law is believed to be that the *quasi* domicil is in some circumstances, and as respects some

<sup>1</sup> Phillim. Dom. 15.

<sup>2</sup> Abington v. North Bridgewater, 23 Pick. 170, 177; s. p. Opinion of the Judges, 5 Met. 587, 589; Thorndike v. Boston, 1 Met. 242; Savage v. Scott, 45 Iowa, 130; Culbertson v. Floyd, 52 Ind. 361. And

see Judson v. Lathrop, 1 La. An. 78; Burnham v. Rangeley, 1 Woodb. & M. 7; Greene v. Greene, 11 Pick. 410; Tipton v. Tipton, 87 Ky. 243.

<sup>3</sup> Yelverton v. Yelverton, 1 Swab. & T. 574, 585; s. p. Phillim. Dom. 18, 19.

questions, permitted to stand in the place of the real one; as, for example, a residence not amounting to a real domicile may give to a merchant those mercantile rights which the law of domicile confers.<sup>1</sup>

§ 92. **Animo Manendi.** — Simply for a man to live and do business at a place does not constitute it his domicile. He must also intend to make it his home, and to remain there;<sup>2</sup> and to effect a change of domicile, he must not intend to return to his former one.<sup>3</sup> But he need not go further and entertain the affirmative intent never to return, or never afterward to have any other home than the new one. It suffices that he means a permanent distinction from a temporary residence, and that he has no distinct purpose of resuming the former domicile.<sup>4</sup>

§ 93. **The Proof of Domicil** — may consist of declarations of the person whose domicile is in question,<sup>5</sup> his acts,<sup>6</sup> his own testimony to his intent,<sup>7</sup> the presumption that a domicile once established continues,<sup>8</sup> the presumption that it is where his wife and family reside,<sup>9</sup> and such other pertinent facts and presumptions as are competent within general rules of evidence.<sup>10</sup> All the proofs are liable to be controlled by the wider rules of evidence; so that, for example, in some circumstances declarations will not be received, being made by a party in his own interest.<sup>11</sup> And declarations when admissible are often of little effect, and they may be overcome by the declarant's acts.<sup>12</sup>

<sup>1</sup> *Field v. Adreon*, 7 Md. 209; *The Anna Green*, 1 Gallis. 274; *The Joseph*, 1 Gallis. 545.

<sup>2</sup> *S. v. Dayton*, 77 Mo. 678; *Kemna v. Brockhaus*, 10 Bis. 128.

<sup>3</sup> *Ante*, § 89; *post*, § 105; *Graveley v. Canton*, 25 S. C. 1, 60 Am. R. 478.

<sup>4</sup> *Larque v. His Wife*, 40 La. An. 457; *Young v. Pollak*, 85 Ala. 439; *Cerro Gordo v. Hancock*, 58 Iowa, 114.

<sup>5</sup> *Burgess v. Clark*, 3 Ind. 250; *Gorham v. Canton*, 5 Greenl. 266, 17 Am. D. 231; *Beason v. S.* 34 Missis. 602; *Tillman v. Mosely*, 14 La. An. 710; *Brodie v. Brodie*, 2 Swab. & T. 259.

<sup>6</sup> *Doucet v. Geoghegan*, 9 Ch. D. 441; *The Venus*, 8 Cranch, 253, 279; *Richmond v. Vassalborough*, 5 Greenl. 396; *East Livermore v. Farmington*, 74 Me. 154.

<sup>7</sup> *Kemna v. Brockhaus*, 10 Bis. 128.

<sup>8</sup> *Nixon v. Palmer*, 10 Barb. 175;

*Mitchell v. U. S.* 10 Ct. Cl. 120; *Desmare v. U. S.* 93 U. S. 605; *Crookenden v. Fuller*, 1 Swab. & T. 441. See *C. v. Bradford*, 9 Met. 268.

<sup>9</sup> *Platt v. Attorney-General*, 3 Ap. Cas. 336; *Smith v. Croom*, 7 Fla. 81; *Williams v. Whiting*, 11 Mass. 424.

<sup>10</sup> *West Boylston v. Sterling*, 17 Pick. 126; *Fisk v. Chester*, 8 Gray, 506; *Lyman v. Fiske*, 17 Pick. 231, 28 Am. D. 293; *Fleming v. Straley*, 1 Ire. 305; *Sherwood v. Judd*, 3 Bradf. 267.

<sup>11</sup> *Wright v. Boston*, 126 Mass. 161; *Watson v. Simpson*, 13 La. An. 337; *Griffin v. Wall*, 32 Ala. 149. See *Burnham v. Rangeley*, 1 Woodb. & M. 7; *Weld v. Boston*, 126 Mass. 166.

<sup>12</sup> *In re Steer*, 3 H. & N. 594; *Crookenden v. Fuller*, 1 Swab. & T. 441; *Shelton v. Tiffin*, 6 How. U. S. 163; *Gourlay v. Gourlay*, 15 R. I. 572.

§ 94. **Law or Fact.** — What constitutes a domicile is a question of law; but the facts in evidence and the presumptions are to be weighed by the jury, who will determine, as of fact, where the domicile is.<sup>1</sup> So, —

§ 95. **The Burden of Proof** — is governed by the rules common to the several departments of the law of evidence. For example, a domicile of origin is presumed to remain until a change is shown, the burden being upon the party who relies upon the change.<sup>2</sup>

## II. *Specially in Divorce Law.*

§ 96. **Elsewhere.** — In a preceding chapter, we saw how domicile is the basis of jurisdiction over the matrimonial status. We shall in the next chapter consider the wife's capacity for a domicile separate from her husband's in divorce causes. As to the sort of domicile, within our present inquiries, —

§ 97. **The Rule** — is believed to be that the domicile must be complete and full, in distinction from a *quasi* domicile,<sup>3</sup> — adequate for every other purpose.<sup>4</sup>

<sup>1</sup> *Pennsylvania v. Ravenel*, 21 How. U. S. 103; *Pearce v. S. 1 Sneed*, 63, 60 Am. D. 135.

<sup>2</sup> *Steel v. Steel*, 15 Scotch Sess. Cas. 4th ser. 896; *In re Patience*, 29 Ch. D. 976, 980.

<sup>3</sup> *Ante*, § 90, 91.

<sup>4</sup> I am not aware of this having ever been so laid down in terms, but I think that the cases generally imply it, and that such is the true reason of the law. Consult, for example, *Briggs v. Briggs*, 5 P. D. 163; *Wilson v. Wilson*, Law Rep. 2 P. & M. 435; *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Santo Teodoro v. Santo Teodoro*, 5 P. D. 79; *Dolphin v. Robins*, 7 H. L. Cas. 390, 414; *Tollemache v. Tollemache*, 1 Swab. & T. 557, 559; *Steel v. Steel*, 15 Scotch Sess. Cas. 4th ser. 896; *Colburn v. Colburn*, 70 Mich. 647; *D'Etchegoyen v. D'Etchegoyen*, 13 P. D. 132. Said Mr. Commissary Ross: "Although in other respects the two cases may not be analogous, I apprehend that the same kind of domicile that is required to be ascertained in a question of intestate movable succession is the domicile that is required in a question of ordinary status. The point to be investigated in the one case is the real

domicil of the individual at the period of death; in the other, at the period when the question involving the consideration of the status of the party happens to be tried." *Gordon v. Hampden*, Ferg. 276, 331, 3 Eng. Ec. 430, 463. On a petition before the full English Divorce Court for the dissolution of a marriage, where the evidence of domicile to sustain the jurisdiction was held to be sufficient, it was observed: "We say nothing as to what the effect of the evidence might be in a testamentary suit. We think that the petitioner was *bona fide* resident here, not casually, or as a traveller." *Brodie v. Brodie*, 2 Swab. & T. 259, 263. It was once intimated in the House of Lords, by Lord Colonsay, that something less than the domicile for all purposes might under the international rule suffice for divorce. "Jurisdiction," he said, "to redress wrongs in regard to domestic relations does not necessarily depend on domicile for all purposes." *Shaw v. Gould*, Law Rep. 3 H. L. 55, 96. But it is believed that this language was inadvertent, and that, since the influence of marriage extends through all the relations of life, a corresponding domicile — namely, for all purposes — is

§ 98. **Why?** — The reason is, because the status of marriage is of universal interest, governing or qualifying all the rights of the parties, affecting the relations of all other persons with them, and placing them in a new position as regards the State. There is hardly anything which may not be one way or another according as a man and woman dwelling in the community are held to be husband and wife or single persons. If they are married, one who slanders the woman must answer to the two; if single, only to her. If they are married, a third person cannot enter into a valid contract with her; if they are single, he can. If they are married, one who has a claim against the man cannot have her testimony as a witness against him; if they are single, he can. If they are married, the State cannot indict him for a rape on the woman; if they are single, it can. And thus we might go on with these illustrations through nearly every affair and relation of life, public and private; so that to set up, to nullify, to qualify, or to dissolve a marriage status will affect the entire interests of the parties, of all other individuals, and of the State. The result whereof is that in just legal doctrine, and in the intrinsic fitness of things, the domicil should be all that is required in all the other issues involving all these rights respectively. Again, —

§ 99. **The Proofs of Domicil for Divorce** — are the same which have been already considered;<sup>1</sup> that is, the same as of domicil in the fuller and larger sense of the term.<sup>2</sup> Added to which, and as in a measure special to this issue, —

§ 100. **Temptations to deceive** — (**Going away for Divorce**). — The facilities for divorce in our States being unequal, the temptations are often great for parties wishing to get rid of a marriage which the courts of their own State have no power to dissolve, to feign a change of domicil to a State where the facilities are adequate. As to which, in point of law, —

§ 101. **Motive for Change** — (**To obtain Divorce — Other Purposes**). — Men's reasons for a change of domicil are limitless. And the motive which induced a particular change is immaterial as to its efficacy.<sup>3</sup> One who takes the step because he does not like the taxes in the place where he is,<sup>4</sup> or to avoid an arrest for crime,<sup>5</sup>

indispensable to a jurisdiction for its dissolution.

<sup>1</sup> Ante, § 93-95.

<sup>2</sup> Ante, § 97, note.

<sup>3</sup> Cooper v. Galbraith, 3 Wash. C. C. 546.

<sup>4</sup> Draper v. Hatfield, 124 Mass. 53.  
See also Thayer v. Boston, 124 Mass. 132,  
26 Am. R. 650.

<sup>5</sup> Young v. Pollak, 85 Ala. 439.

or by becoming a "citizen" of another State<sup>1</sup> to qualify himself to maintain a suit in the national tribunals,<sup>2</sup> as effectually changes his domicile as though he did it to become rich or famous by growing up in a new country. "But," in the words of Story, J., "his removal must be a real one, *animo manendi*, and not merely ostensible."<sup>3</sup> In like manner, if a man is dissatisfied with the divorce laws of his own State and pleased with those of another, or if his domestic relations are unhappy in his own State and he thinks they will be happy in another, whereupon he goes to the other State in good faith intending to relinquish his old home and become a permanent resident of the favoring locality, his domicile is as absolutely changed in law as though his motive were of any other sort.<sup>4</sup> In the words of Morse, J., in a Michigan case: "We think the evidence clearly shows that the complainant is a good-faith resident of this State. If so, it is entirely immaterial what motives influenced him in coming here. And certainly the fact that he moved here because he was suited with our laws, or wished to receive the benefit of them, should not be used against him to debar him of his rights under those laws. It may be that our divorce laws at that time were not as strict as they ought to have been, but that is no reason why they should not have been enforced with an equal hand. The fact that a man moves from New York because the laws of this State are more suited to his ideas or wants in life, to become a good-faith resident of this State, cannot operate against him here. He is entitled to the equal benefit and privilege of the laws with those who were born here, or who removed here without thought or understanding of our laws."<sup>5</sup> At the same time, —

§ 102. **Simply for Divorce, not to Remain.** — One who goes to another State simply to procure a divorce and return, not intending a permanent change of residence, does not acquire a new domicile; hence his divorce proceeding is a fraud on the court, and void.<sup>6</sup> Now, —

<sup>1</sup> Const. U. S. art. 3, § 2; *Read v. Bertrand*, 4 Wash. C. C. 514; *Robertson v. Cease*, 97 U. S. 646.

<sup>2</sup> *Case v. Clarke*, 5 Mason, 70; *Shelton v. Tiffin*, 6 How. U. S. 163.

<sup>3</sup> *Case v. Clarke*, *supra*; *S. P. Cooper v. Galbraith*, 3 Wash. C. C. 546.

<sup>4</sup> *Ante*, § 65; *Carswell v. Carswell*, 8

Scotch Sess. Cas. 4th ser. 901. And see *Burley v. Shannon*, 115 Mass. 438.

<sup>5</sup> *Colburn v. Colburn*, 70 Mich. 647, 649.

<sup>6</sup> *Neff v. Beauchamp*, 74 Iowa, 92; *Colburn v. Colburn*, 70 Mich. 647; *Whitcomb v. Whitcomb*, 46 Iowa, 437.

§ 103. **Open to Suspicion.** — If a person is applying for divorce in a State where he has been present only during the period which a statute has required to precede the application; if the *delictum* he relies on would not authorize this remedy in the State whence he came; and if he left behind lands, houses, friends, and business, while he has none in the new State, — one will not readily believe that in good faith he has changed his domicil. Though he swears to the change,<sup>1</sup> observers will set him down as an adventurer away from home, endeavoring by a false representation to get from a cheated court a worthless writing in the form of a divorce decree wherewith to deceive some unsuspecting woman into a polygamous marriage with him. In a case of this complexion, the New Jersey Court, having the power to decide both the law and the facts, said that a citizen of another State who brings his effects here for the purpose of establishing a residence manifestly to procure a divorce, and immediately commences the suit, is not an inhabitant within the meaning of the act concerning divorces, and it will decline jurisdiction over his cause, however intrinsically meritorious. “I know,” added Chancellor Green, “that the language of the statute is very broad, and may, in its terms, embrace the case now under consideration. But I nevertheless think that the legislature were legislating for the citizens of this State, not for others. The subject is one of grave importance, and is daily assuming a more serious aspect. At this hour, a large proportion of the divorces asked for in this court is by citizens of other States, who come into this State for the mere purpose of obtaining a divorce, and often in evasion of their own laws. There is too much reason to apprehend collusion of parties in actions of divorce, in regard to the establishment of a domicil, as well as with respect to the procedure. Conflict of jurisdiction, injury to morals, reproach to our law, oppression and fraud, as well as obloquy to the judicature which must administer the law, are the evident consequences which must follow from the influx of parties from other States to obtain a dissolution of marriage here, in opposition to the rule of their own law.”<sup>2</sup> Still, for all this, —

<sup>1</sup> For a case in which the fact was found contrary to the oath of the party, under surroundings quite similar to those supposed in the text, see *Manning v. Manning*, Law Rep. 2 P. & M. 223. See also *Gourlay v. Gourlay*, 15 R. I. 572; *Hendricks v. Hendricks*, 72 Ala. 132. A case wherein the oath was believed, is *Wilson v. Wilson*, Law Rep. 2 P. & M. 435.

<sup>2</sup> *Winship v. Winship*, 1 C. E. Green, 107, 109, 110.

§ 104. **Distinguishing Law and Fact.** — We have seen<sup>1</sup> that the domicil *may* change with the personal presence,<sup>2</sup> even where divorce is the motive thereto; and when it does, the new citizen, like any other, is entitled to the protection of the laws. There are cases which seem even to imply that the removal from one State to another can be effectual only when made without the intention of obtaining a divorce, though probably none go quite to this point,<sup>3</sup> — a proposition which would certainly be erroneous. Still, in these cases, as in others, a mere intention to change the domicil is not enough; there must be an actual abiding in the new State;<sup>4</sup> and it must be without the affirmative intent to live again in the old one.<sup>5</sup>

§ 105. **Returning after Divorce.** — If, in the sort of case now in contemplation, the party after obtaining his divorce returns to the State of his former domicil, the inference will be more or less strong according to the circumstances that the change of domicil was a mere pretence. Yet in strict law, especially as applied in causes other than for divorce, it was not necessary when the removal was made that there should be an absolute, fixed resolution never to come back;<sup>6</sup> if it was in good faith, and there was even a floating and undefined idea of a possible return at some future period, still the domicil is changed.<sup>7</sup> There is a Massachusetts case, perhaps not quite beyond question as general doctrine, holding that if one removes with his family into another State, keeping his place of business but no dwelling-house here, and intending to retain his domicil and to return at some future period, he still loses in law his Massachusetts domicil.<sup>8</sup> Of course, when the domicil was lost in Massachusetts, it was acquired in the other State. But one may doubt whether the same court would apply this doctrine in divorce law.<sup>9</sup> The true view proba-

<sup>1</sup> Ante, § 101.

<sup>2</sup> *Johnson v. Johnson*, 4 Paige, 460. And see *Greene v. Greene*, 11 Pick. 410; *Chase v. Chase*, 6 Gray, 157.

<sup>3</sup> *Smith v. Smith*, 4 Greene, Iowa, 266; *Shannon v. Shannon*, 4 Allen, 134.

<sup>4</sup> *Hall v. Hall*, 25 Wis. 600.

<sup>5</sup> *Wilbraham v. Ludlow*, 99 Mass. 587; *Brown v. Ashbough*, 40 How. Pr. 260; *P. v. Peralta*, 4 Cal. 175; *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Sewall v. Sewall*, 122 Mass. 156, 23 Am. R. 299; *Briggs v. Briggs*, 5 P. D. 163.

<sup>6</sup> Ante, § 92.

<sup>7</sup> *S. v. Frest*, 4 Harring. Del. 558; *S. v. De Casinova*, 1 Tex. 401; *Ringgold v. Barley*, 5 Md. 186, 59 Am. D. 107; *Warren v. Thomaston*, 43 Me. 406; *Putnam v. Johnson*, 10 Mass. 488. And see *Plummer v. Brandon*, 5 Ire. Eq. 190; *Hairston v. Hairston*, 27 Missis. 704, 61 Am. D. 530; *Jennison v. Hapgood*, 10 Pick. 77.

<sup>8</sup> *Holmes v. Greene*, 7 Gray, 299.

<sup>9</sup> See *Chase v. Chase*, 6 Gray, 157; *Leith v. Leith*, 39 N. H. 20; *McGiffert v. McGiffert*, 31 Barb. 69; *Smith v. Smith*,

bly is, that the law and proofs of domicile are the same in divorce causes as in others; but in the actual course of things, the temptation for litigants to practise frauds on courts and juries as to their domicile is so great, and the successful frauds are so numerous, that the constantly awakened vigilance which necessarily attends these hearings will often refuse to be convinced by evidence which would be accepted as ample in causes of a different sort.

### III. *Whether or how "Residence" for Divorce is distinguishable from Domicil therefor.*

§ 106. **Statutory Terms.**—The word in most of our jurisdictional statutes is "residence," or "reside," or sometimes "live," and not the technical "domicil," which is the word commonly used in expositions of the interstate jurisprudence. If, in interpretation, "reside" or "live" is satisfied by something less than a domicile, our divorces pronounced under command of the statutes are mere local affairs, or at least not *prima facie* complying with the interstate law. Now,—

§ 107. **Unaided Meanings.**—The words "residence" and "domicil," standing alone, and not limited or qualified by the subject, are not in the law equivalents in meaning.<sup>1</sup> Thus viewed, the former does not require the *animus manendi*, but the latter does.<sup>2</sup> So under some circumstances, as in the case of an infant, one may have a domicile in a place where he never resided.<sup>3</sup> Like dissimilarities prevail in the significations of "inhabitant," "citizen," and "resident," when their first meanings are not bent by the connection or subject.<sup>4</sup> But—

§ 108. **The Connection or Subject**—or both may modify the sense of any word.<sup>5</sup> Thus, "residence" denotes an abode more

13 Gray, 209; Shannon v. Shannon, 4 Allen, 134.

<sup>1</sup> Alston v. Newcomer, 42 Missis. 186; Briggs v. Rochester, 16 Gray, 337, 340; Chariton v. Moberly, 59 Mo. 238; Venuci v. Cademartori, 59 Mo. 352; Savage v. Scott, 45 Iowa, 130; In re Watson, 4 Bankr. Reg. 613; Beavers v. Smith, 11 Ala. 20; Bartlett v. New York, 5 Sandf. 44; Robertson v. Cease, 97 U. S. 646, 648.

<sup>2</sup> Long v. Ryan, 30 Grat. 718, Morgan v. Nunes, 54 Missis. 308; Wheeler v. Cobb, 75 N. C. 21, 25; New York v. Genet, 4

Hun, 487; Collinson v. Teal, 4 Saw. 241; Foster v. Hall, 4 Humph. 346; Hayes v. Hayes, 74 Ill. 312; Walker v. Walker, 1 Mo. Ap. 404; Jopp v. Wood, 34 Beav. 88; Hoskins v. Matthews, 8 De G. M. & G. 13; Moorhouse v. Lord, 10 H. L. Cas. 272.

<sup>3</sup> Walcot v. Botfield, Kay, 534.

<sup>4</sup> S. v. Kilroy, 86 Ind. 118; Everhart v. Huntsville College, 120 U. S. 223.

<sup>5</sup> Bishop Written Laws, § 82, 92 d, 93, 95 a, 98 a, 102, 111, 121; Long v. Ryan, 30 Grat. 718.



or less permanent, the degree of permanence varying with the nature of the case,<sup>1</sup> until in some connections and as applied to some things it means domicile, — an abode *animo manendi*.<sup>2</sup> On the other hand, “domicil” in a statute is sometimes restricted by interpretation to mean no more than “residence” in its primary sense.<sup>3</sup> Looking at the ordinary significations, residence is *prima facie* evidence of a domicile.<sup>4</sup> A familiar instance of interpreting “residence” in a written law to extend further and mean “domicil” is where it is used to define the qualifications of voters.<sup>5</sup> On principles thus explained, —

§ 109. **In Divorce Law**, — which is a branch of the private law of nations, and in conformity with which it should therefore be interpreted,<sup>6</sup> the statutory term “reside” or “residence,” including “inhabitant,” as employed to denote the jurisdiction for divorce, should be rendered to mean the same thing which “domicil” does in the international law, unless the contrary is affirmatively manifest from the other words of the statute. And so our courts commonly regard this question.<sup>7</sup> Still, —

§ 110. **Not thought of — Further of Residence, &c.** — We have exceptional cases in which this just view, as appearing in the reasons thus given, did not occur to the tribunal,<sup>8</sup> therefore resulting in conclusions more or less divergent from the true ones. For example, it was in Illinois intimated rather than decided that under the word “residence” something less than domicile will confer the jurisdiction. “While,” said the learned judge, “a man

<sup>1</sup> *Cohen v. Wigfall*, 8 Rich. 237; *Cunningham v. Maund*, 2 Kelly, 171; *Riggs v. Andrews*, 8 Ala. 628; *Long v. Ryan*, 30 Grat. 718.

<sup>2</sup> *Culbertson v. Floyd*, 52 Ind. 361; *Lamar v. Mahony*, Dudley, Ga. 92; *Boardman v. House*, 18 Wend. 512; *Turner v. Buckfield*, 3 Greenl. 229; *Winter Iron Works v. Toy*, 12 La. An. 200; *Crawford v. Wilson*, 4 Barb. 504, 520; *Kennedy v. Ryall*, 67 N. Y. 379, 386. See *Chaine v. Wilson*, 1 Bosw. 673; *Ely v. Lyons*, 18 Wend. 644; *Frost v. Brisbin*, 19 Wend. 11, 32 Am. D. 423.

<sup>3</sup> *McMullen v. Wadsworth*, 14 Ap. Cas. 631, 636.

<sup>4</sup> *Shelton v. Tiffin*, 6 How. U. S. 163; *Johnson v. Merchandise*, 2 Paine, 601; *Bempde v. Johnstone*, 3 Ves. 198; *Gillis v. Gillis*, Ir. Rep. 8 Eq. 597.

<sup>5</sup> *P. v. Platt*, 117 N. Y. 159.

<sup>6</sup> *Bishop Written Laws*, § 5-8, 82, 86, 88, 122-146.

<sup>7</sup> *Carpenter v. Carpenter*, 30 Kan. 712, 46 Am. R. 108; *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Hanson v. Hanson*, 111 Mass. 158; *Winship v. Winship*, 1 C. E. Green, 107; *Williamson v. Parisien*, 1 Johns. Ch. 389; *Smith v. Smith*, 4 Greene, Iowa, 266; *Coddington v. Coddington*, 5 C. E. Green, 263; *Hinds v. Hinds*, 1 Iowa, 36, 49. And see *P. v. Dawell*, 25 Mich. 247, 12 Am. R. 260; *Hendricks v. Hendricks*, 72 Ala. 132; *Lyon v. Lyon*, 2 Gray, 367; *Kruse v. Kruse*, 25 Mo. 68; *Schonwald v. Schonwald*, 2 Jones Eq. 367; *Ashbaugh v. Ashbaugh*, 17 Ill. 476.

<sup>8</sup> Ante, § 28, 29, and the places in the first volume there referred to.

can have but one domicil, he may have several residences; and though the residence is more transient in its nature, there must be some intent of permanent business. It cannot be acquired by going to a place with the purpose of retiring immediately. When the domicil and entire business are within another jurisdiction, residence cannot be obtained by a visit to this State merely for the institution of the suit without any other intention.”<sup>1</sup> And in Kentucky, under a jurisdictional requirement of “a residence in this State for one year next before the commencement of the action,” the court refused to entertain jurisdiction on proof of a domicil during the year, termed in the opinion “a legal residence,” in the absence of the party’s personal presence, called an “actual residence.”<sup>2</sup> It will occur to the reader that, under this view of the law, a married person whose domicil is in Kentucky while he is temporarily living elsewhere, has nowhere any right of divorce, however flagrant the dereliction. If he is sent abroad to represent his country at any foreign court, and his wife remains in Kentucky with a paramour, and lives with him in open adultery, he has no divorce standing in the foreign country where he has no domicil, and none at home. Of course, it is competent for the legislature to prescribe this rule, but most legal persons will deem that the intent thus to discriminate against him ought to appear in terms clearer than those just quoted.

<sup>1</sup> *Way v. Way*, 64 Ill. 406, 412. And see *Briggs v. Briggs*, 5 P. D. 163, 165.

<sup>2</sup> *Tipton v. Tipton*, 87 Ky. 243. Where the provision was that “no person shall be entitled to a divorce from the bond of matrimony, by virtue of this act, who is not a citizen of this State, and who has not resided therein at least one whole year previous to filing his or her petition;” and the parties were citizens, yet the wife who was plaintiff had, at the time of instituting her suit and for a period before, a temporary residence abroad, with the intention of returning,—the jurisdiction was upheld. “Do the latter words intend,” it was asked, “that the residence shall be one whole year immediately before filing the petition? We are of opinion that they do not. When the citizenship is once established, the court

will not consider, where there is no intention of abandonment, that mere absence from the State shall be such abandonment. . . . She had resided in the State one whole year before filing the petition, and against a citizen we will not unnecessarily make that year next before filing the complaint.” *Fickle v. Fickle*, 5 Yerg. 203. See *Person v. Person*, 6 Humph. 148, in respect to the subsequent Tennessee statute of 1835. And see *McDermott’s Appeal*, 8 Watts & S. 251. Under the statutory words “shall have been a resident of this State for the term of three years during which such desertion shall have continued,” the inhabitancy, it was held, must be continuous. *Sanders v. Sanders*, 2 Stew. Ch. 410. See *Brown v. Brown*, 1 McCarter, 78, 2 McCarter, 499.

§ 111. *The Doctrine of this Chapter restated.*

It appearing in preceding elucidations that the jurisdiction over a marriage status is at the domicile of one or both of the parties, this chapter explains that "domicil" is the place at which a person resides without the intent of removing to another; a domicile thus established continuing in law until a new one is acquired by actual removal, accompanied by the intent to remain. If a party goes to another State to obtain a divorce, intending to return when he gets it, he acquires no domicile there, and the divorce is void. But if he removes there *animo manendi*, because choosing to live in a State wherein he can better his domestic condition in preference to one forbidding him, the transmutation of residence being made in good faith, the law gives him the new domicile, and his divorce is internationally valid. Our jurisdictional statutes commonly employ the word "residence" or some similar word instead of "domicil," but it is interpreted to mean the same thing; though, in some other connections and as applied to other subjects, residence is only *prima facie* evidence of domicile.

## CHAPTER V.

## SPECIALLY OF THE WIFE'S DOMICIL FOR DIVORCE.

§ 112. **Leading Doctrine and Reason defined.** — The relation of husband and wife, considered without reference to divorce, makes their habitation one, the husband to determine where it shall be; so that in law her domicile is said to follow his.<sup>1</sup> But a rule of law is qualified by and ceases with the reason whence it is derived.<sup>2</sup> Therefore this rule cannot prevail in a divorce cause, founded on the allegation of a *delictum* which legally justified a living apart, and took away the husband's right to fix the domicile of the wife. For the allegation of the *delictum* and the allegation or assumption of a domicile in her derived from his would be repugnant, consequently bad in law.<sup>3</sup> Necessarily, therefore, the law must and does permit separate domicils for divorce.<sup>4</sup>

§ 113. **Differences.** — Such, when we pause to reflect, is seen plainly to be the law, and such the reason whereon it rests. But not always has the true reason, consequently not always has the true rule, occurred to the minds of judges considering this sort of question,<sup>5</sup> — the light of the law having, as in many other instances, broken in upon the professional understanding only by degrees. So that the cases in the books are in some conflict as to minuter points, and as to the broader doctrine the American and English ones stand apparently in absolute contradiction. Looking into the cases, and tracing the doctrine somewhat in detail, —

§ 114. **On Questions other than Divorce,** — the possibility of a wife having a domicile apart from her husband's has sometimes been

<sup>1</sup> Vol. I. § 1714; ante, § 87, 88; Greene v. Greene, 11 Pick. 410; Hairston v. Hairston, 27 Missis. 704, 61 Am. D. 530; Smith v. Morehead, 6 Jones Eq. 360; Williams v. Saunders, 5 Coldw. 60; Hackettstown Bank v. Mitchell, 4 Dutcher, 516; McAfee v. Kentucky University, 7 Bush, 135; Bennett v. Bennett, Deady, 299; In re Daly, 25 Beav. 456; Scholes v. Murray Iron Works, 44 Iowa, 190; Porterfield v. Au-

gusta, 67 Me. 556. And see Waterborough v. Newfield, 8 Greenl. 203; Brewer v. Linnaeus, 36 Me. 428.

<sup>2</sup> 1 Bishop Crim. Law, § 273-275. And see Republic v. Skidmore, 2 Tex. 261.

<sup>3</sup> 1 Bishop Crim. Proced. § 489.

<sup>4</sup> Ante, § 27, 33, 34, 55, note. For the cases, see subsequent sections in this chapter, and particularly § 120, 121.

<sup>5</sup> Ante, § 28, 29, 110.

conceded.<sup>1</sup> For example, there is authority for allowing her, in special circumstances, a separate settlement.<sup>2</sup> And there is authority for holding that if she brings against her husband an ordinary personal action, pursuant to a statute permitting husband and wife to sue each other, she may, if rightfully living apart from him, have her separate domicile for the purpose.<sup>3</sup> Now, —

§ 115. **Reasons.** — These non-divorce cases, assuming them to be correctly decided, severally proceed on some reason different from the one stated in the opening section of this chapter as governing divorce. And it does not follow that because the reason there set down does not cover these cases, they are therefore wrong. The conclusion of a court may, and it often does, rest equally well on one or another of any number of separate reasons, or on all of several reasons combined. And whatever the reasons for these non-divorce exceptions to the general rule of domicile, they will be found on examination to be not out of harmony with the divorce rule, and to give it added strength. Thus, —

§ 116. **Presumption from Statute — (Wife as Plaintiff).** — If, when a statute authorizes a wife to bring an ordinary suit against her husband, it by interpretation includes the needful collateral rights,<sup>4</sup> among which is the right to have a separate domicile therefor, the same reason applies also, and with added force, to a suit which a statute permits her to bring against him for divorce. Without this right, he might change the matrimonial domicile to South Carolina<sup>5</sup> or to some foreign country which does not allow divorce, and thereby, contrary to the implication or terms

<sup>1</sup> *Prater v. Prater*, 87 Tenn. 78, 10 Am. St. 623.

<sup>2</sup> *Washington v. Mahaska*, 47 Iowa, 57; qualified in *Burlington v. Swanville*, 64 Me. 78. See also *Williamsport v. Eldred*, 84 Pa. 429, 432. The English doctrine appears to be that a woman at marriage takes her husband's settlement if he has one; if not, she retains her own. But during the coverture she can acquire none separate from his. 4 Burn Just. 28th ed. 273, 314; *Berkhampstead v. St. Mary*, 2 Bott P. L. 25; *Tynton v. King's Norton*, 2 Bott P. L. 24; *Rex v. St. Botolph's*, Bur. Set. Cas. 367; *Rex v. Norton*, Bur.

Set. Cas. 122; *Rex v. Brington*, 7 B. & C. 546; *Rex v. Cottingham*, 7 B. & C. 615.

<sup>3</sup> *Lyon v. Lyon*, 30 Hun, 455.

<sup>4</sup> In *Bishop Written Laws*, § 137, this doctrine is shown to have had an early standing in legal interpretation, and to have been at every period recognized in our common law; namely, "that every enactment carries with it so much of collateral right and remedy as will make its provisions effectual." Consult specially, among the cases there cited, *Oath before Justices*, 12 Co. 130; *Heard v. Pierce*, 8 Cush. 338.

<sup>5</sup> Vol. I. § 58.

of the statute, take away from her the remedy it had conferred.<sup>1</sup> Again, —

§ 117. **Where no Necessity for Separate Domicils.** — The rule of separate domicils, by its terms, does not extend to cases wherein there is no need for them. Consequently it does not forbid in proper circumstances a jurisdiction derived from unity of domicile, — a doctrine quite apart from the other. Thus, —

§ 118. **Wife as Defendant.** — If the wife commits an offence entitling the husband to a divorce, she cannot, in just principle, set it up to bar the jurisdiction of the court in his suit; both because it is an act in her own wrong, and because the allegation of it would be repugnant to her denial of guilt. Likewise, on his side, after he has given her due notice of the proceeding, his averment of her guilt does not preclude him from maintaining that for jurisdiction his domicile is hers; because plaintiffs do not forfeit rights in return for defendants' wrongs. The consequence of which is that in principle a husband may have a jurisdiction against his wife founded on the law which makes his domicile hers. And most of the adjudged cases accept this conclusion, to the extent, at least, of avoiding any mere technical objection to the court's taking jurisdiction of the husband's cause, when the wife is in fact dwelling in another country.<sup>2</sup> This doctrine is not inconsistent with the practice, under statutes, of proceeding against her as a non-resident, when she is such in fact, for the purpose of notifying her of the divorce suit. But he cannot so treat her when he sends her out of the State, or confines her in an asylum, and she is absent by his will, not her own.<sup>3</sup> And if he abandons her in one State and removes to another, intentionally leaving her behind, he cannot by this act of his own wrong draw her domicile with him into the new State to found a suit against her.<sup>4</sup> Another of these collateral questions is —

<sup>1</sup> And compare with ante, § 47.

<sup>2</sup> *Warrender v. Warrender*, 2 Cl. & F. 488; *Chichester v. Donegal*, 1 Add. Ec. 5, 19; *Tovey v. Lindsay*, 1 Dow, 117, 138, 139; *Whitcomb v. Whitcomb*, 2 Curt. Ec. 351, 7 Eng. Ec. 139; *Gillis v. Gillis*, Ir. Rep. 8 Eq. 597; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. D. 227; *Burlen v. Shannon*, 115 Mass. 438; *Larquie v. His Wife*, 40 La. An. 457. But see *Borden v. Fitch*, 15 Johns. 121, 8 Am. D. 225; *Irby v. Wil-*

*son*, 1 Dev. & Bat. Eq. 568, 582; *Toosey v. Toosey*, 14 Daly, 537. And see *Greene v. Greene*, 11 Pick. 410; *Hull v. Hull*, 2 Strob. Eq. 174; *Harrison v. Harrison*, 19 Ala. 499; *Hare v. Hare*, 10 Tex. 355; *Hood v. Hood*, 11 Allen, 196, 87 Am. D. 709.

<sup>3</sup> *Newcomb v. Newcomb*, 13 Bush, 544, 26 Am. R. 222.

<sup>4</sup> *Champon v. Champon*, 40 La. An. 28, 31, 32, Todd, J. observing: "It would

§ 119. **Plaintiff Wife relying on Husband's Domicil.** — If the parties are living in different States, and the statutes of the husband's State require the applicant for divorce to be domiciled therein, can the wife, relying on the rule that his domicil is hers, sue him for divorce in his State? Where the statutory term is "reside," a question discussed in the last chapter will arise.<sup>1</sup> But assuming such term to require a domicil, and assuming as we may that the husband cannot set up his own wrong to oust the wife of her jurisdiction, she, alleging and proving his guilt, shows herself competent to have a separate domicil. And when it also appears that she is living in another State *animo manendi*, her separate domicil would seem to be fully established as well in evidence as in law. And one domicil appearing, she cannot at the same instant have another.<sup>2</sup> Such is the doctrine of principle. In authority, this question in most of our States is not settled.<sup>3</sup> But where a husband deserted his wife in Massachusetts, in which State she continued to reside, himself removing to New Hampshire, the court of his new domicil refused to accept it as the wife's for divorce, — holding, in her suit there, that it had no jurisdiction. "When the husband," said Fowler, J., "abandoned his wife, necessity of separate and independent existence gave her a separate residence and domicil; and when he came into this State, leaving her in Massachusetts, her domicil remained there with her, and there it still continues."<sup>4</sup> And so it has been held in North Carolina,<sup>5</sup> in Missouri,<sup>6</sup> and in Wisconsin.<sup>7</sup> Such, therefore, may be deemed to be the law on authority. Still this is a conclusion contrary to natural justice and the true policy of legis-

do violence to the plainest principle of common sense and common justice to call this residence of the guilty husband, where the wife is forbidden to come, or of which she knows nothing, the domicil of the wife. The true meaning of this aphorism, touching the domicil of the wife being that of her husband, is that the domicil of the wife is the domicil that the husband has at his marriage, or provides after marriage for himself and his wife, and which, though he may change at pleasure, it must be one to which the wife is taken or invited, or at least of which she knows, and to which she may go and stay at her will."

<sup>1</sup> Ante, § 106-110.

<sup>2</sup> Ante, § 90.

<sup>3</sup> The reader may consult, but without much help on this question, *Davis v. Davis*, 30 Ill. 180; *Ashbaugh v. Ashbaugh*, 17 Ill. 476, *Kashaw v. Kashaw*, 3 Cal. 312; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. D. 227; *Thompson v. S.* 28 Ala. 12, 17; *Hanberry v. Hanberry*, 29 Ala. 719, 724.

<sup>4</sup> *Hopkins v. Hopkins*, 35 N. H. 474. See *Masten v. Masten*, 15 N. H. 159.

<sup>5</sup> *Schonwald v. Schonwald*, 2 Jones Eq. 367.

<sup>6</sup> See *Pate v. Pate*, 6 Mo. Ap. 49, 52. See *Kruse v. Kruse*, 25 Mo. 68.

<sup>7</sup> *Dutcher v. Dutcher*, 39 Wis. 651, 659.

lation. A State ought not to forbid any person, wherever residing, to sue one of its domiciled citizens for a breach of the duties of marriage.<sup>1</sup> Yet, in our country, for the same reason that plaintiffs are by statutes required to reside in the State a given number of years before the suit is commenced, so also should be defendants where a non-resident is plaintiff. Returning now to the main doctrine of this chapter,—

§ 120. **Further of the Reasoning, with Authorities.**—Our American judges, affirming the right of separate domicils for divorce, have not generally put it upon the reasoning stated in the opening section of this chapter,<sup>2</sup> probably because it did not occur to them.<sup>3</sup> But their reasoning has more nearly accorded with that stated in a section a little later;<sup>4</sup> namely, that divorce statutes, like all others, should be construed in a way to render their provisions effectual.<sup>5</sup> Thus, Shaw, C. J., in a Massachusetts case, observed that the rule which makes the husband's domicile the wife's is "founded upon the theoretic identity" in interest of the two. "But," he continued, "the law will recognize a wife as having a separate existence and separate interests and separate rights, in those cases where the express object of all proceedings is to show that the relation itself ought to be dissolved, or so modified as to establish separate interest, and especially a separate domicile and home,—bed and board being put, a part for the whole, as expressive of the idea of *home*. Otherwise the parties, in this respect, would stand upon very unequal grounds; it being in the power of the husband to change his domicile at will, but not in that of the wife."<sup>6</sup> And in a Pennsylvania case, Agnew, J., stated forcibly: "The unity of person created by the marriage is a legal fiction to be followed for all useful and just purposes, and not to be used to destroy the rights of either, contrary to the principles of natural justice, in proceedings which from their nature make them opposite parties."<sup>7</sup> And the general conclusion that for divorce the wife may have a domicile separate from her husband is abundantly established in American authority; though some of the cases seem to take the distinction (it is submitted, without just foundation)

<sup>1</sup> And see post, § 139.

<sup>2</sup> Ante, § 112.

<sup>3</sup> Ante, § 28, 29, 110, 113.

<sup>4</sup> Ante, § 116.

<sup>5</sup> *Irby v. Wilson*, 1 Dev. & Bat. Eq. 568, 582; *Stevens v. Stevens*, 1 Met. 279.

<sup>6</sup> *Hartean v. Hartean*, 14 Pick. 181, 185, 25 Am. D. 372. And see also the *Republic v. Skidmore*, 2 Tex. 261.

<sup>7</sup> *Colvin v. Reed*, 55 Pa. 375, 379.



that a wife does not lose her domicile by the husband's change of residence after the offence is committed, yet cannot, on the other hand, acquire a new one.<sup>1</sup> Indeed, there are direct rulings that she cannot acquire a new one for divorce after the offence is committed;<sup>2</sup> while yet the preponderance of American authority, as well as weight of argument, is believed to be greatly the other way. It remains to inquire how this question stands under the —

§ 121. **Constitution of the United States.** — A clause in our National Constitution requires full faith and credit to be given in each State to the judicial proceedings in every other.<sup>3</sup> Under which, we shall see more minutely in the next chapter, a divorce sentence will in our interstate law be good or bad in States other than that in which it was rendered, according as the court had

<sup>1</sup> *Mellen v. Mellen*, 10 Abb. N. Cas. 329; *Jones v. Jones*, 60 Tex. 451; *Derby v. Derby*, 14 Bradw. 645; *Lazovert v. Lazovert*, 14 Bradw. 655; *Bowman v. Bowman*, 24 Ill. Ap. 165; *Smith v. Smith*, 4 Mackey, 255; *Frery v. Frery*, 10 N. H. 61, 32 Am. D. 395; *Harding v. Alden*, 9 Greenl. 140, 23 Am. D. 549; *Sawtell v. Sawtell*, 17 Conn. 284; *Fickle v. Fickle*, 5 Yerg. 203; *Richardson v. Richardson*, 2 Mass. 153; *Brett v. Brett*, 5 Met. 233; *Fishli v. Fishli*, 2 Litt. 337; *Tolen v. Tolen*, 2 Blackf. 407; *Hare v. Hare*, 10 Tex. 355; *Hinds v. Hinds*, 1 Iowa, 36, 50; *Jenness v. Jenness*, 24 Ind. 355, 87 Am. D. 335; *Craven v. Craven*, 27 Wis. 418; *Hanberry v. Hanberry*, 29 Ala. 719, 724; *Moffatt v. Moffatt*, 5 Cal. 280; *Yates v. Yates*, 2 Beasley, 280; *Kinnier v. Kinnier*, 45 N. Y. 535, 544, 6 Am. R. 132; and the other authorities cited to this section. See also *Dasent v. Dasent*, 1 Rob. Ec. 800; *Wharton v. Mair*, Ferg. 250, 3 Eng. Ec. 414; *Harrison v. Harrison*, 19 Ala. 499; *Vischer v. Vischer*, 12 Barb. 640; *Shanks v. Dupont*, 3 Pet. 242; *Chase v. Chase*, 6 Gray, 157.

<sup>2</sup> *Dorsey v. Dorsey*, 7 Watts, 349; *Neal v. Her Husband*, 1 La. An. 315; *Jackson v. Jackson*, 1 Johns. 424 (overruled in *Kinnier v. Kinnier*, supra, as to which see *P. v. Dawell*, 25 Mich. 247, 12 Am. R. 260); *Maguire v. Maguire*, 7 Dana, 181, 186; *Johnson v. Johnson*, 12 Bush, 485. And see *Cooper v. Cooper*, Milward, 373; *Pawling v. Willson*, 13 Johns. 192, 208; *Tenducci's Case*, cited 3 Phillim. 595; *Collett*

*v. Collett*, 3 Curt. Ec. 726, 7 Eng. Ec. 563; *Dasent v. Dasent*, 1 Rob. Ec. 800; *Glover v. Glover*, 16 Ala. 440. **Pennsylvania** — is a sort of exceptional State, concerning which I do not attempt to speak with absolute accuracy, because all practitioners interested therein will have before them their own statutes and decisions. The act of April 13, 1815, § 15, provided that "no person shall be entitled to a divorce from the bond of matrimony, &c., who is not a citizen of this State, and who shall not have resided therein at least one whole year previous to the filing his or her libel or petition." And it was afterward deemed necessary to add, by act of April 18, 1843, that the word "citizen," in the above, "shall not be construed to apply to any woman who shall have had a *bona fide* residence in this State at least one whole year previous to her filing her petition or libel." *Hollister v. Hollister*, 6 Pa. 449, 452. If, from *Dorsey v. Dorsey*, supra, it should be inferred that in Pennsylvania any discrimination is made against the wife as to the right of separate domicils for divorce, it is overruled in the subsequent cases of *Colvin v. Reed*, supra, and *Reel v. Elder*, 62 Pa. 308. It is there maintained that after a *delictum*, even the husband cannot obtain for his divorce suit a new jurisdiction against his wife. These cases will be more particularly considered in a subsequent chapter. And see *Philadelphia v. Wetherby*, 15 Philad. 403.

<sup>3</sup> Vol. I. § 1094, 1132.

jurisdiction or not. And palpably the jurisdiction or its absence will in a part of the cases depend on the wife's capacity or otherwise for a separate divorce domicil. In these cases, the question becomes a national one, as to which the Supreme Court of the United States is the tribunal of ultimate resort.<sup>1</sup> And this court has held, on this exact question, that after a husband has committed the offence, the wife may acquire a new domicil wherein to have the marriage dissolved. In the facts of the case, the husband had appeared to his wife's divorce suit, and made an unsuccessful defence, but he had not changed his domicil. The appearance would make no difference; for if neither party was domiciled within the jurisdiction of the court, by all opinions it could not entertain the cause, however both might consent. Said Swayne, J., in delivering the unanimous opinion of this high tribunal: "It is insisted that Cheever [the husband] never resided in Indiana; that the domicil of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicil whenever it is necessary or proper that she should do so. The right springs from the necessity of its exercise, and endures as long as the necessity continues. The proceeding for a divorce may be instituted where the wife has her domicil. The place of the marriage, of the offence, and the domicil of the husband are of no consequence."<sup>2</sup> And this doctrine of the capacity of husband and wife to have separate domicils is carried so far that, by virtue of their being domiciled in different States, they may sue each other in the national tribunals.<sup>3</sup>

§ 122. **Separations by Mutual Agreement**—being illegal as contrary to the policy of the law,<sup>4</sup> it follows that during a separation of this sort, and on a question other than divorce, the wife's domicil must be the same as her husband's; for to hold otherwise would be to pronounce the agreement for a separate living legal, — a *quasi* divorce.<sup>5</sup> Again, —

§ 123. **Restitution of Conjugal Rights**. — In the suit for the restitution of conjugal rights, the object whereof is cohabitation, — the bringing of the parties together and making the union closer,

<sup>1</sup> Post, § 180–185.

<sup>4</sup> Vol. I. § 1268 et seq.

<sup>2</sup> Cheever v. Wilson, 9 Wal. 108, 123.

<sup>5</sup> Warrender v. Warrender, 2 Cl. & F

<sup>3</sup> Bennett v. Bennett, Deady, 299.

488.

not separating them by divorce, — there would seem to be neither ground nor necessity for separate domicils. So, at least, it was held by Sir C. Cresswell, who, refusing to allow the wife a separate domicil, and referring to the American law, and to the expositions of it given in the author's old commentaries on "Marriage and Divorce," said: "The privilege there [in the United States] allowed the wife appears to have been founded on principles quite inapplicable to this case, namely, that the party suing (whether husband or wife) must before suit reside for a certain time in the State where it is instituted; and, therefore, if a wife were bound to follow her husband to sue him where he resides, he could always defeat her suit by changing his residence before she could commence it. Another ground was, that the wife then contended that by her husband's delinquency she had a right to be released from the marriage tie; whereas here she is seeking to enforce it."<sup>1</sup> Now, —

§ 124. **Further of Divorce Reasons.** — It is believed that this learned person was mistaken in deeming our rule of separate domicils to rest, to any extent really affecting the question, upon the statutes requiring a plaintiff's domicil in the State where the suit is brought; though this consideration is sometimes mentioned. That we may see how this is, let us suppose the following case to arise in England, where there is no such statute. According to the principles of general law, as we in the United States hold them, not now inquiring what is the English doctrine, the Divorce Court could not dissolve the marriage of parties domiciled out of England.<sup>2</sup> Upon this, an English couple come on a tour of travel to the United States. Here the man falls in love with an American girl, elopes with her, and settles down in adultery *animo manendi*, renouncing England and his wife together. She returns to her father's house, and brings her suit for dissolution in the English Divorce Court. The English statute entitles her to the remedy she prays. There are now open to the court three ways of dealing with the case, and one of them it must choose, — first, to disobey the statute in spite of the familiar rule<sup>3</sup> that it carries with it by construction whatever is necessary to make it

<sup>1</sup> *Yelverton v. Yelverton*, 1 Swab. & T. 574, 591. See *Shaw v. Attorney-General*, Law Rep. 2 P. & M. 156; *Chichester v. Chichester*, 10 P. D. 186.

<sup>2</sup> *Ante*, § 43–46, 48, 50.

<sup>3</sup> *Ante*, § 116, 120.

effectual; or, secondly, to grant the divorce on the principle of interfering with the internal affairs of a foreign friendly nation, by determining a status where no party to it has an English domicil; or, thirdly, by accepting as law the voice of common-sense that, as the husband thrust his wife from him and gave her the legal right to be again a *feme sole*, enough of her domicil cleaves to England to give authority to the Divorce Court to record, in the form of a decree, this conclusion of the English law. The last, it is submitted, is the true course. It carries out the spirit of the statute, by giving to the wife the same justice which would have awaited the husband if he had been the one to return to England and she the one to elope. Still, —

§ 125. **English Perpetual Allegiance.** — Where facts nearly like these supposed ones occurred in England, — namely, where a husband came to our country, leaving his wife behind, and here acquired a domicil and committed adultery and bigamy, — the full Divorce Court found apparently a fourth way, and granted the dissolution prayed. “Both parties,” said the learned judge ordinary, speaking for himself and the rest, “were natural-born English subjects; both, therefore, owed allegiance to the crown of England, and obedience to the laws of England; that allegiance cannot be shaken off by a change of domicil; the husband, therefore, although he became domiciled in America, continued liable to be affected by the laws of his native country.”<sup>1</sup> Is it, then, the doctrine of this court, that all persons born in England, and domiciled in this country, both those who are naturalized here and those who are not, can have their divorce business done up in London? And if these persons had been born in France, of French parents, yet had lived in England since they were a week old, would the woman have been, therefore, denied her divorce? When will the mysteries of perpetual allegiance cease to be unfathomable? At all events, —

§ 126. **No Separate Divorce Domicil in England.** — Whatever the course of reasoning, the decisions of the English Divorce Court appear to have established in it the doctrine that in England the wife cannot have even a divorce domicil separate from her hus-

<sup>1</sup> *Deck v. Deck*, 2 Swab. & T. 90, 92. *liniski v. Zyckliniski*, 2 Swab. & T. 420; And see *Santo Teodoro v. Santo Teodoro*, *Palmer v. Palmer*, 1 Swab. & T. 551; 5 P. D. 79; *Niboyet v. Niboyet*, 4 P. D. *Simonin v. Mallac*, 2 Swab. & T. 67. 1; *Bond v. Bond*, 2 Swab. & T. 93; *Zyck-*

band's.<sup>1</sup> The question seems not to have travelled to the House of Lords. When it does so, this highest tribunal will doubtless cast the final conclusion on the one side or the other according as the arguing counsel accurately, inaccurately, or not at all, lay before it the true considerations, the same which it has been attempted, however imperfect the execution, to explain in this chapter.

§ 127. *The Doctrine of this Chapter restated.*

In ordinary circumstances, and on questions other than divorce, the law requires husband and wife to dwell together, so that it is impossible they should have separate domicils. It empowers the husband, not the wife, to determine where the habitation shall be. A short, therefore a common, form of expressing this doctrine is to say that the wife's domicil follows the husband's. The law fixes her home where he lives, and whether she is rightfully or wrongfully absent in fact, her domicil is in law at his home. But if he has driven her away, or committed a matrimonial offence which compelled her to leave him, or deserted her, and she sues him to obtain the law's adjudication that she is rightly absent and he is divorced from her, she alleges what gives her a separate domicil, and the judgment of the court, if in her favor, sustains this her claim. If the judgment is against her, she fails; and it is immaterial whether we say that she fails from want of domicil, or from lack of proof of her main accusation. There are other reasons for the rule, and there are special considerations derived from the differing surroundings under which its application may be attempted. But the explanations already given will suffice without further repetitions.

<sup>1</sup> The reader can consult *Shaw v. Attorney-General*, Law Rep. 2 P. & M. 156, 161; *Yelverton v. Yelverton*, 1 Swab. & T. 574, 591; *Le Sueur v. Le Sueur*, 1 P. D. 139 (A. D. 1876, reviewing prior cases), affirmed on appeal, 2 P. D. 79; *Niboyet v. Niboyet*, 3 P. D. 52, reversed on appeal, 4 P. D. 1; *Briggs v. Briggs*, 5 P. D. 163.

## CHAPTER VI.

## SPECIFIC QUESTIONS OF THE INTERNATIONAL JURISDICTION.

- § 128, 129. Introduction.
130. No Jurisdiction over Status without Domicil.
- 131-158. As to Status, Sufficient if One Party domiciled.
159. As to Personal Rights, must be Citation or Appearance.
- 160-163. Place of Offence immaterial.
- 164-173. Immaterial where Domicil when Offence committed.
- 174-178. Immaterial where Marriage celebrated.
179. These Doctrines not in Conflict with United States Constitution.
- 180-185. But bind States under United States Constitution and Decisions.
- 186-189. Some Minor Questions.
190. Doctrine of Chapter restated.

§ 128. In the Foregoing Chapters — are brought to view the leading principles which govern the several specific propositions to be made the subject of this one. Already some of those propositions have been pretty minutely explained, but their simple restatement here, as parts of a combined whole, will be practically helpful. The minuter details under other of the propositions are for this chapter.

§ 129. **How Chapter divided.** — We shall consider, severally, that, I. There is no Jurisdiction over the Marriage Status without a Domicil; II. Over the Status the Domicil of One Party suffices; III. Over the Personal Rights of the Parties there is no Jurisdiction without Citation or Appearance; IV. The Place of the Commission of the Offence is immaterial; V. It is immaterial where the Domicil was when the Offence was committed; VI. It is immaterial where the Marriage was celebrated; VII. These Propositions are not in Conflict with the United States Constitution; VIII. As between the States, the United States Constitution and Decisions make them binding on all State Tribunals; IX. Some Minor Questions.

I. *There is no Jurisdiction over the Marriage Status without a Domicil.*

§ 130. **Already** — an entire chapter has been given to showing that the jurisdiction over the status follows the domicil of the parties.<sup>1</sup> Within that chapter is included the subject of this sub-title, and nothing need here be added.

II. *Over the Status the Domicil of One Party suffices.*

§ 131. **In the First Chapter** — of this volume, this doctrine appears in brief, with something of the reasons for it.<sup>2</sup>

§ 132. **In Intervening Chapters**, — we have seen that domicil confers jurisdiction over the marriage status,<sup>3</sup> and that for questions connected with it husband and wife may have separate domicils.<sup>4</sup> Hence, —

§ 133. **Doctrine and Reasons defined.** — Since every government has authority to determine or change the marital status of its citizens, and since within this rule husband and wife may have separate domicils, the jurisdiction for divorce is in the courts of any country or State in which either one of the parties has a domicil. Otherwise, while the wife was domiciled in one State and the husband in another, there could be no divorce in either, and the statutes of each State permitting divorce would be as to these parties inoperative.<sup>5</sup> So that for this conclusion we have both the international rule authorizing the jurisdiction and the command of the statute in the particular State.

§ 134. **How Formerly the Authorities.** — Though, as we shall presently see, this doctrine is now abundantly settled by the adjudications of our courts, the decisions were formerly contradictory, vague, and uncertain. The true distinctions<sup>6</sup> had seldom or never occurred to the judicial understanding;<sup>7</sup> and those perverse mental conditions, which as explained in the first volume<sup>8</sup> have rendered it impossible even to ascertain what the statutes are except by consulting all in their original sources, had largely

<sup>1</sup> Ante, § 41-75.

<sup>2</sup> Ante, § 19, 20, 23, 25-27, 32-34, 37.

<sup>3</sup> Ante, § 41-75.

<sup>4</sup> Ante, § 112-127.

<sup>5</sup> Within a principle stated ante, § 116 and note.

<sup>6</sup> Ante, § 1, 2.

<sup>7</sup> Ante, § 28, 29.

<sup>8</sup> Vol. I. § 80-85.

clouded the judicial perceptions. So that to an extent which it would not be flattering to state, judges, horrified at the idea of opening up a life of happiness to persons who had experienced the woes of an unfortunate marriage, refused to recognize the application to this question of those beneficent principles of the law which they were in the habit of applying in other departments of legal investigation. Again, —

§ 135. In the **English Ecclesiastical Courts**, — which then in the mother country had the sole jurisdiction of this sort of question, there were technical obstacles, having no relation to the merits, rendering the consideration of this particular question impossible. In theory of the ecclesiastical law, the tribunals assumed cognizance of causes, not for the sake of justice to plaintiffs, but for the good of the souls of defendants, who were corrected and brought right by their judgments; but a bishop could not undertake the care of a soul not domiciled, especially not present, within his diocese, much less of one domiciled and remaining out of the kingdom. Therefore it was canonical law in those courts,<sup>1</sup> and it was afterward made law by a statute, that no person be cited out of his diocese.<sup>2</sup> True, this statute was held to have been enacted for the benefit of defendants, who could waive it, and persons cited merely to see proceedings were not within its protection;<sup>3</sup> but no practical effect on the present question was wrought by this interpretation. Besides, the English courts had no authority to dissolve valid marriages; marriage itself had not at this time been defined as a status;<sup>4</sup> divorces from bed and board would be valueless, therefore practically they were not sought, where the husband could not be served with process within the jurisdiction, so as to make the decree for alimony enforceable. The result of all which is, that there was and could be no doctrine on this

<sup>1</sup> 106th Canon of 1603, Gibs. Cod. 445, 446.

<sup>2</sup> Stat. 23 Hen. 8, c. 9; Collett v. Collett, 3 Curt. Ec. 726, 7 Eng. Ec. 563, 564; Rogers Ec. Law, 2d ed. 779; Ayl. Parer. 182; Carden v. Carden, 1 Curt. Ec. 558. In Cooper v. Cooper, Milward, 373, 381, this statute was held not to extend to Ireland. It was deemed also that the canon does not apply to persons having no fixed residence. Said the learned judge, Dr. Radcliff: "Of this declaratory statute it

is to be observed that it and its penalties only apply to the case of persons cited, who are inhabitants and dwellers in some *diocese* or *peculiar district*, and not to persons having no habitation or dwelling at all." See also Nixon v. The Office, Milward, 390, note; Dasent v. Dasent, 1 Rob. Ec. 800.

<sup>3</sup> Collett v. Collett, supra; Chichester v. Donegal, 1 Add. Ec. 5, 17, 18; Donegal v. Donegal, 3 Phillim. 586, 597.

<sup>4</sup> Vol. I. § 11-37.



question of *ex parte* divorces to be transmitted to us from the mother country, and none came. Consequently, —

§ 136. **American Development.** — While the common law came to us laden with the principles which determine this question of *ex parte* divorces, the work of applying them, and thus formulating the doctrine, fell to the profession in this country. At the time when, in 1852, the author's original commentaries on "Marriage and Divorce" were published, neither preceding authors nor the judges had done much of this work. By that production, and by the approving comments and decisions of judges made subsequently, the result has been wrought out. To proceed, partly by recalling something more of the reasons of the law, and partly by recourse to the adjudications, —

§ 137. **Non-appearing Party — His State.** — Where only the applicant for a divorce is before the court, and the offender is domiciled in another State, a decree reducing such applicant's status from marital to non-marital — operating thus *in rem*<sup>1</sup> and not *in personam* — has no element whereof either the other married party or the State of his domicile is entitled to complain. By the very fact that the parties are permanently dwelling, *animo non reverendi*, within different sovereignties, the marriage has ceased to be of any practical effect; it exists only in theory of law. There is no ground, therefore, for the one State, or for the party domiciled in it, to object when the other State chooses to change its theory of law as to its party, and to hold him not to be married. The State not acting in the divorce can do afterward as it pleases with its theory of law. As the laws of our States — at least, most of them — now are, a married man who has ceased to have a wife, or a married woman who has no longer a husband, is not a married person. The relation of husband and wife being in its nature capable of existing only in pairs, when one part of the dual status is removed by being made non-marital, the other part is — like the side of a pair of scissors from which its mate has been taken, being therefore no longer scissors — not a marital status.<sup>2</sup> Still, while in the absence of legislation a court is not justifiable in holding it to be such status, the legislature may, if it chooses, make it such for all purposes of disability, the same as it was before the

<sup>1</sup> Ante, § 19, 20, 23, 26, 27, 33, 34, 36.

<sup>2</sup> Vol. I. § 698-702; ante, § 46, note; post, § 153-158.

divorce. It may declare that its subject shall not marry again,<sup>1</sup> and it may misname the offence of such marriage polygamy. And thus it may proceed with all the rest.<sup>2</sup> Even were this otherwise, —

§ 138. **Right to determine Status.** — The right of any State to declare the status of its own domiciled subject is absolute.<sup>3</sup> Without this right, no ruler could be a sovereign in his own dominions.<sup>4</sup> And both in reason and by the highest judicial authority in our country, this doctrine applies as well to a husband or wife whose married partner is permanently abiding in another State, as to both parties when living together in the same State.<sup>5</sup> In line with this doctrine are all the legal analogies. Thus, during slavery, in a case not governed by the fugitive-slave law, the courts in a free State held any man who was a slave in a slave State to be free, equally whether his master was present also in the free State, or had actual notice of the litigation, or was abiding in the slave State, or was ignorant of the proceeding and did not appear. Now, —

§ 139. **Suit at Defendant's Domicil.** — If the parties have their domicils in different States, one may carry on divorce proceedings in the State of the other, should no statute there forbid, and thereby no rule of interstate jurisdiction will be violated.<sup>6</sup> The decree will determine directly the defendant's status, and its direct or indirect effect on that of the plaintiff will depend on principles to be explained further on.<sup>7</sup> In other cases, as to —

§ 140. **Citation or Notice.** — The difficulty arises when one sues for a divorce in the courts of his own domicil, and no notice is or can be given to the defendant, except a publication in the newspapers, which he may not see, or a personal citation in the foreign jurisdiction, which legally amounts to no more than the publication, since the process of a court cannot run into the territory of a foreign government.<sup>8</sup> In most of our States, unlike England

<sup>1</sup> Vol. I. § 703 et seq.

<sup>2</sup> And see *Wright v. Wright*, 24 Mich. 180; *Beard v. Beard*, 21 Ind. 321; *Turner v. Turner*, 44 Ala. 437.

<sup>3</sup> Ante, § 32, 45, 46, 49.

<sup>4</sup> *Ib.*; Vol. I. § 849, 851.

<sup>5</sup> *Pennoyer v. Neff*, 95 U. S. 714, 722, 734, 735. See post, § 180–185.

<sup>6</sup> Ante, § 55 and note; post, § 194; *Watkins v. Watkins*, 135 Mass. 83, *Geils v. Geils*, 1 Macq. Ap. Cas. 36, 253. And

see *Thompson v. S.* 28 Ala. 12, 17; ante, § 63, 119. In Indiana, if the court has jurisdiction of the plaintiff's cause, it may then on a cross-petition grant a divorce in favor of a non-resident. *Jenness v. Jenness*, 24 Ind. 355, 87 Am. D. 335.

<sup>7</sup> Post, § 153–158, 180–185.

<sup>8</sup> *Harding v. Alden*, 9 Greenl. 140, 23 Am. D. 549; *Irby v. Wilson*, 1 Dev. & Bat. Eq. 568, 577; *Tolen v. Tolen*, 2 Blackf. 407; *Collett v. Collett*, 3 Curt. Ec.

and Scotland, it is practically impossible for a plaintiff to proceed without a domicile of his own; because there are either statutory provisions requiring the applicant to have resided within the State a specified number of years before he brings his suit, or there are other technical statutory impediments, tantamount in their effect. But nearly or quite all the statutes direct a constructive notice, and require the courts to proceed thereon, thus commanding the jurisdiction. And if the ordinary international rule did not make such jurisdiction good, still the qualified one stated in a preceding chapter<sup>1</sup> should constrain the courts of those States in which this statute prevails, to accept as valid the jurisdiction assumed under like statutes in other States. And in international law necessity, which is a force omnipotent in all legal affairs,<sup>2</sup> compels the acceptance of the notice as sufficient; because no higher grade of notice to absent defendants is possible; and unless this rule is adopted, the State of the plaintiff has no means for determining the status of its citizen.<sup>3</sup> In conformity with this view are the adjudications, though not in all is the reasoning of the court in these terms.<sup>4</sup> Further as to which, —

§ 141. **Differing Natures of Citation.** — A citation conferring jurisdiction, and one for fairness and openness when the jurisdiction rests on some other ground,<sup>5</sup> are quite different things, depending on different principles, and unlike in their results. To distinguish between them is of the utmost importance, yet in our books the distinction is often overlooked.<sup>6</sup> Thus Ayliffe lays it down that “a citation is matter of natural right, introduced *ab origine mundi*; for,” he quaintly argues, “God cited our first parent saying, Adam! Adam! Where art thou?”<sup>7</sup> But God’s citation of Adam was not in a divorce suit, or in an admiralty one *in rem*. And this sort of case was not within Ayliffe’s contemplation, therefore upon it his words weigh nothing.<sup>8</sup> Burge, having in mind

726, 7 Eng. Ec. 563, 567; *Dunn v. Dunn*, 4 Paige, 425; *Ableman v. Booth*, 21 How. U. S. 506; *Bischoff v. Wethered*, 9 Wal. 812; *McEwan v. Zimmer*, 38 Mich. 765, 31 Am. R. 332; *Shepard v. Wright*, 113 N. Y. 582; *Burton v. Burton*, 45 Hun, 68.

<sup>1</sup> Ante, § 12, 13.

<sup>2</sup> 1 Bishop Crim. Law, § 54, 346–354.

<sup>3</sup> Ante, § 25–27.

<sup>4</sup> Cases cited in subsequent sections; *In re Newman*, 75 Cal. 213; *Kline v.*

*Kline*, 57 Iowa, 386; *Hansford v. Hansford*, 34 Mo. Ap. 262.

<sup>5</sup> Ante, § 25–27, 76–79, 81.

<sup>6</sup> Within explanations ante, § 28, 29.

<sup>7</sup> Ayl. Parer. 180. The views in *Borden v. S.* 6 Eng. 519, 54 Am. D. 217, appear not quite so. And see *Sanford v. Sanford*, 5 Day, 353; *Thompson v. Steamboat Morton*, 2 Ohio St. 26; *Pillsbury v. Dugan*, 9 Ohio, 117, 34 Am. D. 427.

<sup>8</sup> Bishop Non-Con. Law, § 1321–1324.

what more nearly approximates divorce, yet is different, says that notice to the defendant or his presence is not necessarily indispensable to an international jurisdiction. "If," he continues, "the place in which the suit was instituted was that of his domicil, or if he was possessed of property there, he may be said to owe such allegiance and submission to its laws as to be subject to the species of citation which its laws have ordained; and it is in his power to secure to himself ample means of defending himself against the suit, by appointing a representative. A citation, therefore, under those circumstances, although at the time it takes place he may be absent from the country, is not necessarily so repugnant to the principles of natural justice that a foreign tribunal should refuse to recognize it, and treat a sentence founded on it as a nullity."<sup>1</sup> Much more, therefore, is an impossible citation of an absent party not an absolute necessity in a cause of status, when the State and the court have an interstate jurisdiction over the status, which is the subject-matter, and everything reasonably possible is done to give notice. Further as to —

§ 142. **Nature of Constructive Notice.** — Since in all litigation such notice as the circumstances permit is a natural right, and its omission is a species of fraud, the constructive notice cannot be omitted in these *ex parte* divorce suits. It must fill the requirements of the statute whereon it is given.<sup>2</sup> And to be good in interstate jurisprudence, it should not involve a fraud. The party applying for it ought, therefore, to disclose to the tribunal all essential facts; and as far as reasonably practicable the notice should be actual.<sup>3</sup> This is not simply divorce law, the like doctrine applies to other things within the like reasons.<sup>4</sup> Proceeding now to consider more specifically some of the judicial authorities, —

§ 143. **Leading Decisions.** — The decisions upon this question did not begin at a very remote period in our American jurisprudence.

<sup>1</sup> 3 Burge Col. & For. Laws, 1056.

<sup>2</sup> Ante, § 5, 14, 31; Werner v. Werner, 30 Ill. Ap. 159; Morey v. Morey, 27 Minn. 265; Collins v. Collins, 80 N. Y. 1; Colton v. Rupert, 60 Mich. 318. And see Hewitson v. Fabre, 21 Q. B. D. 6; Burton v. Burton, 45 Hun, 68.

<sup>3</sup> Doughty v. Doughty, 12 C. E. Green, 315; Bradshaw v. Heath, 13 Wend. 407; Harding v. Alden, 9 Greenl. 140, 148, 23

Am. D. 549. Borden v. Fitch, 15 Johns. 121, 8 Am. D. 225, was a case of gross fraud. In Maguire v. Maguire, 7 Dana, 181, a fraud was attempted by the wife upon the jurisdiction, and neither party had a domicil in Kentucky where the suit was brought. And see Vischer v. Vischer, 12 Barb. 640; Lyon v. Lyon, 2 Gray, 367; Donnelly v. West, 66 How. Pr. 428.

<sup>4</sup> Dorr v. Rohr, 82 Va. 359, 3 Am. St. 106.

Nor did the earlier ones reveal any great degree of juridical enlightenment; on the other hand, they abound in the omissions to think of things indispensable to right determinations,<sup>1</sup> many times spoken of in these commentaries. The first case was in Maine, but following close upon it came another apparently decided without knowledge of it, in —

§ 144. *North Carolina.* — It was in 1837. The facts were that persons intermarried in South Carolina, and removed thence to Tennessee, where they became domiciled. There the wife deserted the husband, and went to live in North Carolina, he still remaining in Tennessee. In due time he brought suit in his own State for the desertion, and obtained a decree dissolving the marriage, — constructive, not actual, notice having been served upon her by proclamations and publications, as directed by statute. This Tennessee divorce the North Carolina Court held to be void; “because,” in the language of Ruffin, C. J., “it was not an adjudication *between any parties*; since the wife did not appear in the suit, nor was served with process, and was not a subject of Tennessee, but was a citizen and inhabitant of this State, and therefore not subject to the jurisdiction of Tennessee, nor amenable to her tribunals.”<sup>2</sup> The court thought of<sup>3</sup> and admitted the fact that the North Carolina wife could not be served with process, other than the constructive notice which was given her, not being within the territory of Tennessee.<sup>4</sup> But it overlooked what should have been the controlling fact, that the proceeding in Tennessee was not instituted to divorce her, but to relieve her Tennessee husband of his marital status; and the further fact that to deny the validity of the Tennessee divorce, where, in the conduct of the cause, the only possible citation had been given to the wife in North Carolina, was to attempt an interference with the government of Tennessee in its own dominions, by denying its authority to fix the status of its own domiciled subject. Properly, therefore, when many years afterward juridical enlightenment on this question had further progressed in our courts, the North Carolina tribunal, proceeding on similar facts, in effect overruled this erroneous decision and established the contrary doctrine.<sup>5</sup> The next

<sup>1</sup> Ante, § 28, 29.

<sup>3</sup> Ante, § 28, 29.

<sup>2</sup> *Irby v. Wilson*, 1 Dev. & Bat. Eq. 568, 576. See also *Dorsey v. Dorsey*, 7 Watts, 349; *Vischer v. Vischer*, 12 Barb. 640.

<sup>4</sup> Ante, § 140.

<sup>5</sup> *S. v. Schlachter*, Phillips, N. C. 520.

leading case to be here stated was in point of time decided anterior to the first of these two, though not cited therein, by the court of—

§ 145. **Maine.**—The date of this one is 1832. It was a woman's action for dower against her husband's grantee, under a statute allowing it on divorce for his adultery the same as on his death. The divorce was in Rhode Island, and the principal question was whether or not it was valid. The parties were married in Massachusetts, then domiciled in Maine; there the husband deserted her; then he took up his residence in North Carolina, and entered into an adulterous connection. She removed to Rhode Island, from the court of which State she obtained her divorce for his adultery. He was never in Rhode Island; but the citation was served on him personally in North Carolina, a mode of service admitted to be no better for founding jurisdiction than service by publication, since no tribunal can send its process into a foreign country.<sup>1</sup> The divorce was adjudged good; therefore her suit was sustained.<sup>2</sup> Kent supplemented this decision by the great weight of his commendation.<sup>3</sup> The reasoning on which it proceeded was a step into the light, but not such as would now be deemed perfect. It was at a time when marriage was defined as a contract.<sup>4</sup> The court observed that it was the "interest" of the husband in his wife, "his right to exact from her the performance of duties, upon which the decree operated. She was within the jurisdiction. . . . Most of the reasons which led to the adoption of the rule that a marriage valid by the law of the place where solemnized should be valid everywhere,—the protection of innocent parties, and the purity of public morals,—require that divorces lawfully pronounced in one jurisdiction, and the new relations thereupon formed, should be recognized as operative and binding everywhere. To this may be excepted cases of fraud and collusion, which, when pleaded and verified, vacate all judgments and decrees. And of this class are decrees obtained in fraud of the law of the domicil of the parties. *Jackson v. Jackson* and *Hanover v. Turner*<sup>5</sup> were decided upon this ground." Added to

<sup>1</sup> Ante, § 140, 144.

<sup>2</sup> *Harding v. Alden*, 9 Greenl. 140, 23 Am. D. 549.

<sup>3</sup> 2 Kent Com. 6th ed. 110, note.

<sup>4</sup> Vol. I. § 20, and accompanying sections.

<sup>5</sup> *Jackson v. Jackson*, 1 Johns. 424; *Hanover v. Turner*, 14 Mass. 227, 7 Am. D. 203.

which, the court explained that great inconvenience would result from a refusal to give effect to divorces of this sort, and showed that it would amount to a denial of justice, except where the injured party could follow up the other and become domiciled in his jurisdiction.<sup>1</sup> Thus, —

§ 146. **Mingled Light and Darkness.** — In the mingled light and darkness of this Maine case and the first of the two North Carolina ones stated in the next preceding section, stood the adjudged law of our States, with nothing supplementing it from England or her colonies, when, in 1852, the first edition of the author's "Marriage and Divorce" was published. Therein he reasoned out the doctrine in the manner in which it has been done in these New Commentaries, and the courts accorded to it their approval. Since, in our common-law countries, unlike those whose jurisprudence is founded on the civil law, every judge will read and weigh carefully the utterances of every preceding judge, but only a part of the judges will heed the words of any text-writer, whether wise or foolish, it was fortunate for the present argument that it came early before a court willing to look into it and accord to it its due weight. The court was that of —

§ 147. **Rhode Island.** — The question coming before the highest tribunal in this State, Ames, C. J., with his associates, carefully examined it as it stood explained in the book just mentioned, and reproducing its arguments rendered a decision which has ever since held the leading place in the adjudged American law of the subject.<sup>2</sup> The case was an application for divorce where the defendant was neither personally in the State nor personally cited; and the court, on full consideration, took the jurisdiction on the express ground that the divorce decree would or should be accepted as binding throughout the world. Said the court, among other observations: "The right to govern and control persons and things within the State supposes the right, in a just and proper manner, to fix or alter the status of the one, and to regulate and control the disposition of the other. Nor is this sovereign power over persons and things lawfully domiciled and placed within the jurisdiction of the State diminished by the fact that there are

<sup>1</sup> The above *Harding v. Alden*, 9 Greenl. 140, 150, 23 Am. D. 549.

<sup>2</sup> Cooley says, that "upon the whole subject of jurisdiction in divorce suits, no

case in the books is more full and satisfactory than that [*Rhode Island one*] of *Ditson v. Ditson*." Cooley Const. Lim. 2d ed. 401 and note.

other parties interested through some relation in the status of these persons, or by some claim or right in those things, who are out of the jurisdiction, and cannot be reached by its process. No one doubts this, as a matter of general law, with regard to the other domestic relations; and what special reason is there to doubt it as to the relation of husband and wife? The slave who flees from Virginia to Canada, no treaty obliging his restoration; or who is brought by his master thence to a free State of the Union, no constitutional provision enforcing his return, — finds his status before the law in the new jurisdiction he has entered changed at once; and no one dreams that this result of a new domicile, and the new laws of it, is less legally certain and proper as a matter of general law, because the master is out of the new jurisdiction of his slave, and is not, or cannot be, cited to appear and attend to some formal ceremony of emancipation. It is true that slavery is a partial and peculiar institution, not generally recognized by the policy of civilized nations; whereas marriage, in some form, is coextensive with the race, and as a relation is nowhere so restrictive and so binding in its obligations as amongst the most truly civilized portions of it. Yet each nation and State has its peculiar law and policy as to the mode of forming, and the mode and causes for judicially dissolving, this last relation, according to its right; and all that other States or nations, under the general law which pervades all Christendom, can properly demand is that in the exercise of its clear right in this last respect, as to its own citizens or subjects, it should pay all, and no more, the attention practicable to the competing rights and interests of *their* citizens and subjects. It should give to non-residents and foreigners, parties to such a relation of general legal sanctity, as to persons of the like description interested in property within its territory, the rights to which are also everywhere recognized, at least such notice by publicity before it proceeds to judicial action as can, under such circumstances, be given consistently with any judicial action at all, efficient for the purposes of justice. To say that the general law inexorably demands *personal* notice in order to such action, or still worse, demands that all parties interested in a relation or in property subject to a jurisdiction should be physically within that jurisdiction, is to lay down a rule of law incapable of execution, or to make the execution of laws dependent, not upon the claims of justice, but upon the chance locality,



or, what is worse, upon the will of those most interested to defeat it.”<sup>1</sup> Again, —

§ 148. **Alabama.** — The question received the like consideration, with the like result, in Alabama. To an indictment for polygamy the defendant set up a divorce in Arkansas. The court below instructed the jury to find it void if from the evidence they should believe “that the defendant was married to Gracy D. Smith in Alabama, and removed to an adjoining county in Mississippi, and while living in Mississippi left his family and went to the State of Arkansas, and there resided one year, and then instituted a suit in Arkansas for divorce against his wife, who never resided in Arkansas, and never had personal notice of the exhibition of the suit [there was the constructive notice, by publication in the newspapers]; and further believe from the evidence that the cause of divorce commenced and existed beyond the State of Arkansas, and never was continued or completed within the State.” Yet the court of review held, on the like grounds as in the Rhode Island case, that neither any one nor all of these things combined would make the divorce void. But it added: “If the defendant did not go to Arkansas *animo manendi*; or if he went to that State merely for the purpose of obtaining a divorce, and intending to remain no longer than was necessary to accomplish his purpose; or if the divorce was procured by fraud, — the decree of the Arkansas Court would be void, and the appellant, in marrying again in this State while his former wife was living, would commit the crime of polygamy.”<sup>2</sup>

§ 149. **North Carolina** — The North Carolina Court, by overruling its early and erroneous doctrine, as stated in a preceding section,<sup>3</sup> brought itself into line with these decisions. But the most remarkable case of all in the State courts is one which to a reader who did not understand the argument would seem adverse. It was in —

§ 150. **New York.** — The courts of this State, from early times, had uttered more or less inaccurate *dicta*, in connection with excellent decisions. Yet, step by step, they had almost, and to casual observation quite, overcome the effects of the ill-considered *dicta*, and almost established the doctrine as laid down in the

<sup>1</sup> *Ditson v. Ditson*, 4 R. I. 87, 102, 103. 22, opinion by Walker, J. And see *Turner*

<sup>2</sup> *Thompson v. S.* 28 Ala. 12, 15, 21, *v. Turner*, 44 Ala. 437.

<sup>3</sup> *Ante*, § 144.

foregoing sections, when the following case arose. Parties were married in Ohio, and there the wife, while the husband was domiciled in New York, obtained a divorce from him. The constructive notice, usual in such cases, had been given; but he was not, as he could not be, personally cited, and he did not appear. After this, he contracted a marriage in New York, and was indicted for it as for polygamy. The question presented by the record was whether or not the Ohio divorce had dissolved the first marriage. The Supreme Court held that it had.<sup>1</sup> The Court of Appeals held that it is competent for any State to determine the marriage status of its own citizen, that the Ohio divorce was effectual to free the applicant from this marriage under the Ohio laws, and that by force of the Constitution of the United States the New York Court must so regard it. But, on the other side, it held that New York had the same right as Ohio to determine the status of its citizen. Hence,—and here was an enormous gap in the argument,—the majority of the court adjudged (that able and accomplished lawyer, the late Chief-Justice Church, dissenting) that the marriage of the man, who, it was admitted, had ceased to have a wife, the former wife having been duly and lawfully divorced from him in Ohio, was, under New York law, polygamy.<sup>2</sup> In the opinion in this case, passing by the hasty determination upon the New York law of indictable polygamy, made without reasoning and evidently without thinking,<sup>3</sup> is given an exact epitomization of the just argument, as presented in every edition of the present author's "Marriage and Divorce," and as confirmed by most of our American courts. But the question will be resumed further on.<sup>4</sup> The crowning decision, which puts an end to the differences, and closes the controversy, is from the —

§ 151. **United States Supreme Court.** — A leading passage from the opinion of the court in the case about to be mentioned has already been quoted.<sup>5</sup> Parties residing in the District of Columbia were there married, after which they there lived together, and children were born. Next, the wife removed to Indiana, the husband remaining in the District of Columbia. In her new domicile she obtained from him a divorce for a cause, adequate there,

<sup>1</sup> *Baker v. P.* 15 Hun, 256.

<sup>3</sup> Ante, § 28, 29.

<sup>2</sup> *P. v. Baker*, 76 N. Y. 78, 32 Am. R. 274. And see *Doughty v. Doughty*, 1 Stew. Ch. 581, 585.

<sup>4</sup> Post, § 153, 154.

<sup>5</sup> Ante, § 121.

which would not have sufficed in the District of Columbia. And this divorce was by the Supreme Court of the United States adjudged to be valid.<sup>1</sup> True, the husband had appeared and defended the divorce suit. But domicile being the rule for jurisdiction over the status,<sup>2</sup> the appearance in court of a non-domiciled party cannot give it. And in this case the fact that the husband had appeared does not seem to have been deemed material. On the other hand, the court, to sustain its judgment, and it would seem for the purpose of leaving no doubt on the reader's mind as to what is meant, refers merely to the present author's elucidations, and to *Ditson v. Ditson*,<sup>3</sup> in which appearance, or even notice, except the constructive notice by publication, was expressly held to be unnecessary. In a later case, not of divorce, but involving the question of notice in proceedings *in rem* and *in personam*, the same tribunal, further to make certain its meaning, said: "To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a State may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which, by the law of the State, a dissolution may be granted, may have removed to a State where no dissolution is permitted. The complaining party would, therefore, fail if a divorce were sought in the State of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress."<sup>4</sup> And for this, to render the meaning if possible more certain, reference was made to the discussions of this sub-title. Hence, —

<sup>1</sup> *Cheever v. Wilson*, 9 Wal. 108, 123, 124, opinion by Swayne, J.

<sup>2</sup> Ante, § 43, 44, 47, 50.

<sup>3</sup> Ante, § 147.

<sup>4</sup> *Pennoyer v. Neff*, 95 U. S. 714, 734, 735, opinion by Field, J.

§ 152. **Conclusion in Authority.**—Rejecting some judicial *dicta* not amounting to decision, more or less adverse,<sup>1</sup> and not taking into the account such cases as the early North Carolina one now overruled,<sup>2</sup> the present clear American doctrine, made conclusive by decisions of the court of ultimate resort, accepts *ex parte* divorces pronounced by the court of the applicant's domicile, in full compliance with the local law after its constructive notice to the absent defendant, as adequate everywhere to dissolve or otherwise ascertain the marriage status.<sup>3</sup>

<sup>1</sup> Colvin v. Reed, 55 Pa. 375; Reel v. Elder, 62 Pa. 308; Shaw v. Attorney-General, Law Rep. 2 P. & M. 156.

<sup>2</sup> Ante, § 144.

<sup>3</sup> In addition to previous cases, Mansfield v. McIntyre, 10 Ohio, 27; Tolen v. Tolen, 2 Blackf. 407; Hull v. Hull, 2 Strobl. Eq. 174; Cooper v. Cooper, 7 Ohio, 2d pt. 238; Harrison v. Harrison, 19 Ala. 499; Gleason v. Gleason, 4 Wis. 64; Hubbell v. Hubbell, 3 Wis. 662, 62 Am. D. 702. It has always seemed to me that this subject is quite too plain to require any such amount of discussion as it has received, even in the work which is superseded by these New Commentaries, when looked at in a purely juridical way. But the difficulty is that in this world where happiness is sometimes deemed too plentiful and woe too scarce, there are even among lawyers persons who become so much excited, when one escapes from an unhappy marriage, as to be incapable of inspecting anything with an unclouded legal eye. And see ante, § 134. I cannot better illustrate this than by referring to three sections with which the editor of a not remote edition of Story's book on the Conflict of Laws closes the chapter on "Foreign Divorces." The reader will observe that the sections are the editor's, not the author's. He begins by laying down some doctrines of a moderately conservative sort, which, he thinks, ought to be held, then says: "It would be an intolerable perversion that an act which, by the law of the State where committed, was no cause of divorce, should, by the removal of the parties to another State where the law was different, become sufficient to produce a dissolution of the married relation;" according whereto, if a man drives his wife from a foreign coun-

try not allowing divorce to our shores, having steeped himself in adulteries, cruelties, and every other conceivable wrong against the marriage as we view it, and he follows her here to torment her, and both parties become domiciled here, "it would be an intolerable perversion" should we, who never accept any foreign status otherwise than of comity, refuse to accept this as free from the flaws which would be in it had the facts transpired here. This sort of doctrine, if the question pertained to anything in the law besides divorce, the learned editor would have seen, drives interstate comity to an extreme not quite conservative, and permits any foreign State from which we receive emigrants to dictate how we shall treat them. "But," he proceeds, "if this were conceded, there is still one further descent, against which almost all civilized States have hitherto protested, but which, to the great discredit of the American character and name, some of the American States seemed disposed to yield; that of giving effect to merely *ex parte* decrees of divorce, granted upon the petition of one of the parties, domiciled temporarily [I interpret this quotation as though this word "temporarily" were not in it, for so the whole connection and subject-matter show the author to mean. He is speaking to correct what he deems to be the erroneous views of somebody; but nobody, no law-writer, no judge, no practising lawyer, living or dead, ever believed, ever held, or ever said, if we except some Scotch opinions of former times, that a court sitting in a country where neither party has a domicile is internationally entitled to dissolve their marriage. And to say that there has come "great discredit of the American character and name" by reason

§ 153. **Status of Non-appearing Party.**—After an *ex parte* divorce rendered upon mere constructive notice, the defendant being domi-

of a part of our courts holding such a notion, would be not only ridiculous but libellous] or permanently in a State foreign to that where the alleged cause of the divorce occurred, and where both parties were at the time domiciled, and where the other party still resides and is domiciled, unless that domicile can be transferred, *in invitum*, after the separation of the parties. *Harding v. Alden*, 9 Greenl. 140, 23 Am. D. 549; *Ditson v. Ditson*, 4 R. I. 87; *Tolen v. Tolen*, 2 Blackf. 407, and some few others probably. But we are happy to believe that this painful disregard of the most vital principles of international jurisprudence has not yet been adopted, or countenanced, in those States whose decisions are most regarded as authority, both at home and abroad. *Dorsey v. Dorsey*, 7 Watts, 349; *Lyon v. Lyon*, 2 Gray, 367; *Borden v. Fitch*, 15 Johns. 121, 8 Am. D. 225; *Vischer v. Vischer*, 12 Barb. 640; *McGiffert v. McGiffert*, 31 Barb. 69; *Maguire v. Maguire*, 7 Dana, 181; *Irby v. Wilson*, 1 Dev. & Bat. Eq. 568, 576; *Edwards v. Green*, 9 La. An. 317; *Hull v. Hull*, 2 Strob. Eq. 174; *Hanover v. Turner*, 14 Mass. 227, 231, 7 Am. D. 203. See also 3 Am. Law Reg. N. S. 193, where we have attempted to show that an *ex parte* decree of divorce, where there is a defect of jurisdiction both as to the subject-matter and one of the parties, is absolutely void, both upon principle and authority; that it is in fact the same as no decree." Story Conf. Laws, 6th ed. by Redf. 230 c, 230 d. I have copied the learned editor's text and notes together, that the reader may see the whole. He will perceive also that this editor and I do not agree as to what, in fact, has been decided by our American courts. A law-writer of less note, whose book not being now before me it is not necessary I should refer to by name and page, states what is said by this editor; and, without looking into the question, in substance pronounces, "Of course it is so." I will indicate, in the briefest way, what I understand to be the effect of the several decisions thus cited against what I have set down as established American

doctrine. *Dorsey v. Dorsey* simply holds that the Pennsylvania Court will not take jurisdiction over a cause of divorce occurring while the parties were not domiciled in the State; as to which, see post, § 168-173. The facts do not raise the question to which it is here cited. *Lyon v. Lyon* holds that, under a Massachusetts statute, which is quoted in the opinion, a divorce obtained by the wife in another State, while both parties were domiciled in Massachusetts, is void. This sound doctrine I endeavored to enforce in a preceding chapter, ante, § 50. In *Borden v. Fitch*, an *ex parte* divorce procured in another State was held to be void, but it was doubtful whether even the plaintiff was domiciled there, and in other respects it was obtained by fraud which, without more, would render it null. And later New York cases fall short of sustaining the doctrine to which the editor cites this case. *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. R. 299. *Vischer v. Vischer* was not a decision by the court of last resort; still, if it were, the foreign divorce was said to have been obtained by fraud, and probably without a domicile, rendering it void on universally accepted principles. *McGiffert v. McGiffert* is of the like sort. *Maguire v. Maguire* is upon the jurisdiction of the Kentucky Court to decree divorces under the statute of the State. In connection with this case, consult *Rhym v. Rhym*, 7 Bush, 316. *Irby v. Wilson* is in effect overruled in the subsequent case of *S. v. Schlachter*, Phillips, N. C. 520, as already explained. Ante, § 144. *Edwards v. Green* is on the right to take jurisdiction in a divorce case under the Louisiana law. *Hull v. Hull* sustains an *ex parte* divorce in Connecticut, obtained by the wife while the husband was domiciled away from his family in South Carolina. It is, therefore, an authority on the other side. *Hanover v. Turner* holds a Vermont divorce to be invalid in Massachusetts, if obtained while both parties were domiciled in the latter State. There is, therefore, in these cases, nothing which is in the strict sense authority for the doctrine

ciled in another State and not in fact appearing, the latter's status still remains, the same as it was before, to the determination of his State, not that of the State in which the divorce was granted. For in the right to fix the status of the citizen the two States stood,

to which they are cited; yet they contain more or less *dicta* tending that way. These *dicta* will be found, in the main, to proceed from the judges not taking into the account the fact that marriage is a status, and divorce a proceeding, in effect, *in rem*; in other words, from not distinguishing between a suit for divorce and a suit to recover a sum of money, — the attention of the court not having been directed to the distinction or in any way adverted to it. No mere *dicta* of judges, however eminent, are entitled to weight in any case, if it appears that the considerations on which the question should turn were not present in their minds. And see Bishop First Book, § 393; ante, § 28, 29; post, § 154. Since this exposition from the learned editor first appeared, it has become in order to say that one of the New York judges, speaking for a majority of the Court of Appeals, expressed the effect of the prior decisions of this State to be quite different from that stated either by this editor or myself. He said that, by them, the doctrine is established that the courts of another State cannot, in an *ex parte* proceeding, “adjudge to be dissolved and at an end the matrimonial relation of a citizen of this State, domiciled and actually abiding here.” *P. v. Baker*, 76 N. Y. 78, 82, 83, 32 Am. R. 274. No one ever claimed that they could; the claim is that the courts of a domiciled person can determine, if authorized by a statute, his status. The other State may do what it chooses with the status of its citizen, who has no married partner within the State, and has ceased to have one abroad. I cannot deem anything more harmless than decisions upholding this universally admitted doctrine. Now, let me here classify some of the cases sustaining the doctrine contended for in this sub-title. **Maine.** — *Harding v. Alden*, 9 Greenl. 140. **Rhode Island.** — *Ditson v. Ditson*, 4 R. I. 87. **Alabama.** — *Thompson v. S.* 28 Ala. 12. **North Carolina.** — *S. v.*

*Schlachter*, Phillips, N. C. 520. **Missouri.** — *Gould v. Crow*, 57 Mo. 200. **Indiana.** — *Tolen v. Tolen*, 2 Blackf. 407; *Wilcox v. Wilcox*, 10 Ind. 436; *Roche v. Washington*, 19 Ind. 53, 81 Am. D. 376; *Beard v. Beard*, 21 Ind. 321. **Iowa.** — *Wakefield v. Ives*, 35 Iowa, 238. And see *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Rush v. Rush*, 46 Iowa, 648. **Massachusetts.** — at least, where the divorce is obtained on the husband's application, *Hood v. Hood*, 11 Allen, 196, 87 Am. D. 709; *Burden v. Shannon*, 115 Mass. 438, 447; *Hood v. Hood*, 110 Mass. 463. **Michigan.** — *Wright v. Wright*, 24 Mich. 180. **Wisconsin.** — *Shafer v. Bushnell*, 24 Wis. 372. **Supreme Court of United States.** — *Cheever v. Wilson*, 9 Wal. 108; *Pennoyer v. Neff*, 95 U. S. 714. See also *Rhym v. Rhym*, 7 Bush, 316; *Shreck v. Shreck*, 32 Tex. 578, 5 Am. R. 251; *Holmes v. Holmes*, 8 Abb. Pr. n. s. 1, and various other cases cited in this sub-title. I have given the reader the above extract from one of the annotators of Story, chiefly to correct its misrepresentations. It is from a writer and former judge who has since exchanged the activities of earth for what is believed to be a higher and purer sphere, wherein prejudices do not cloud the understanding. He was here a gentleman of high position, excellent learning, unblemished character, and universally and justly honored. The prejudice that could speak thus contemptuously of our most learned and esteemed courts, and talk of “perversion,” of “descent,” of “discredit of the American character and name,” without a particle of even attempted reasoning, or the slightest indication that he understood the doctrine against which he was inveighing, is but a reflection of what we occasionally, not often, discover even on the bench. On this question, as on others, men should not complain of the progress of views against which they declaim, but omit to present reasons.

and still stand, equal. Now, there are various ways in which a marriage status may be created, adjusted, or terminated. The least familiar and absolutely exceptional one is by the decree of a court. Commonly the status is created by an act *in pais*, termed a marriage ceremony. Ordinarily it is dissolved by another act *in pais*, termed the death of one of the parties. But exceptionally a judicial setting up of a voidable marriage confirms it, and thereby creates a marriage by an act of the court. Exceptionally also a marriage is judicially dissolved by what is termed a decree of divorce, which terminates the status by an act in court. And the rule is universal, it has prevailed at all times and in all countries since civilization was known on the earth, that when a married man has ceased to have a wife, or a married woman no longer has a husband, the marriage status is at an end. It makes no difference whether this loss of the consort comes from death or from divorce. As there can be no death without dissolving the marriage, so likewise there can be no divorce. And as it is immaterial to this result what power, what government, or what force caused the death, so it is immaterial whence proceeded the divorce. If the divorce was an *ex parte* one and from a foreign government, and the party on whom it operated was a citizen of the foreign State, and the divorcing court had no jurisdiction whatever over the defendant, yet it could and did reduce the plaintiff's status from marital to non-marital, the defendant in the other country would simply be bound by it to the same extent as if the decree of dissolution were rendered by Death, yet no further. The law of the defendant's domicile would be no more outraged in the one case than in the other. It would still remain true at the defendant's home that the man who has a wife is a married man, and the one who has no wife is a single man; and that the woman who has a husband is a married woman, and the one who has not is single. This question has been explained in preceding pages,<sup>1</sup> but a repetition in another form of words seemed here to be desirable. Hereupon, —

§ 154. **Marvellous Oversight.** — In numerous instances in these volumes, the reader's attention has been invited to the disastrous effect of the court's deciding a question in mental oblivion of some consideration which would have been controlling, but was not

<sup>1</sup> Vol. I. § 698-702, 837; ante, § 46, 238; *Dickson v. Dickson*, 1 Yerg. 110, 24 note, 137; *Cooper v. Cooper*, 7 Ohio, 2d pt. Am. D. 444.

thought of.<sup>1</sup> To illustrate this, it sometimes occurs that a case is decided in flat contradiction of a statute to which the judges were not referred, and of the existence of which they had not the remotest idea. When a blunder of this sort transpires; nobody assumes that the statute has been blotted out from existence, and that the court must decide the next case on the authority of the blunder, to the overthrow of the legislative command. But when the thing not thought of is something else, yet is just as important and just as obligatory on the tribunal as a statute, then unfortunately the court will not unfrequently shut ever afterward its eyes to the unthought-of thing, will forbid counsel to mention it, and will not permit itself to look into it.<sup>2</sup> Unhappily, *res judicata* in our law covers a multitude of sins and innumerable human weaknesses of this sort. With this introduction, let us proceed. In the New York case stated a little way back,<sup>3</sup> it was adjudged that where a wife was domiciled in Ohio and the husband in New York, the Ohio Court could divorce her but not him. And the learned judge who delivered the opinion argued the case on the assumption, which we have seen to be utterly without foundation in fact, that in some States other than in New York the power of *ex parte* divorce is held to extend the same to the absent party as to the one present before the tribunal. But he maintained "that, as the law of this State has been declared by its courts," Ohio, while authorized to divorce her own citizen, had no jurisdiction over the marital status of a citizen of New York.<sup>4</sup> And he added, "We

<sup>1</sup> Ante, § 28, 29, and places in the first volume there referred to, also ante, § 110, 113, 134, 143.

<sup>2</sup> And see Bishop Non-Con. Law, § 908, note.

<sup>3</sup> Ante, § 150.

<sup>4</sup> Said the learned judge: "The principle declared in the opinions has been uniform. Such is the utterance in *Borden v. Fitch*, 15 Johns. 121, 8 Am. D. 225; *Bradshaw v. Heath*, 13 Wend. 407; *Vischer v. Vischer*, 12 Barb. 640; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. R. 299. Nor does it avail against them to say that the facts of those cases do not quadrate exactly with those of the case before us. The utterances which we speak of were not inconsiderate expressions, nor *dicta* merely. They were considerate steps in the rea-

soning, leading to the solemn conclusion of the court. And as touching the question in its general relations, we may cite *Kilburn v. Woodworth*, 5 Johns 37, 4 Am. D. 321; *Shumway v. Stillman*, 4 Cow. 292, 15 Am. D. 374; s. c. 6 Wend. 447; and *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. R. 589, where the whole subject is elaborately considered. We know of no case in our courts which has questioned the principle declared in these authorities; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. R. 132,—sometimes claimed to be a departure,—does not. It is recognized there that to make valid in this State a judgment of divorce rendered by a court of another State, that court must have 'the parties within its jurisdiction,' must 'have jurisdiction of the subject-matter and of the parties' who 'must be within



must and will abide by the law of this State.”<sup>1</sup> He further explained: “We must and do concede that a State may adjudge the status of its citizen towards a non-resident; and may authorize to that end such judicial proceedings as it sees fit; and that other States must acquiesce so long as the operation of the judgment is kept within its own confines [at the same time conceding, what is to be explained in a subsequent sub-title, that the Constitution of the United States compels the courts in New York to accord to the Ohio divorce judgment, to the extent of Ohio’s jurisdiction, the effect which it has in Ohio]. But that judgment cannot push its effect over the border of another State, to the subversion of its laws and the defeat of its policy; nor seek across its bounds the person of one of its citizens, and fix upon him a status against his will and without his consent, and in hostility to the laws of the sovereignty of his allegiance.”<sup>2</sup> This, as the author understands the decisions, is the sound and universally accepted doctrine of all the courts of the United States, State and National. The thing overlooked was the duty, which the judge had just said the court would perform, of abiding by the law of New York. The question was not one of interstate law, but of domestic, New York law. And we saw in the last section that, in the absence of statutory direction, the tribunals of every civilized country hold a man who has no wife to be a single man. In this case the man had no wife; for the Ohio Court, by whose decision the New York Court acknowledged itself to be bound, had reduced his former wife’s status to that of a single woman. Such, then, was the law of New York, which the majority of the court violated when it declared that a man whose wife the Ohio tribunal, by a decree which under the National Constitution had the same effect in New York as in Ohio, had reduced to the status of a single woman, was still a married man; and that he committed polygamy when, thus being

the jurisdiction of the court.’ *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. R. 129, does not. That case was close. It went upon the ground, built up with elaboration, that both parties to the judgment were domiciled in Louisiana when the judicial proceedings were there begun and continued and the judgment was rendered, and were subject to its laws, including those for the substituted service of process. We meant to keep the reach of our

judgment within the bounds fixed by the facts in that case.” *P. v. Baker*, 76 N. Y. 78, 82, 83, 32 Am. R. 274. And see further as to the New York cases on the subject of this sub-title, ante, § 152, note; *Stanton v. Crosby*, 9 Hun, 370; *Holmes v. Holmes*, 4 Lans. 388, 57 Barb. 305; *Moe v. Moe*, 2 Thomp. & C. 647.

<sup>1</sup> *P. v. Baker*, supra, p. 83.

<sup>2</sup> *Ib.* p. 84.

without a wife, he married.<sup>1</sup> In later cases, the New York Court takes up the work of —

<sup>1</sup> *P. v. Baker*, *supra*. If one should argue to a court that, because the President and Congress of the United States have the power to make war, therefore there is war, it would not be greatly impressed with the logic. But in this case, the court itself reasoned upon the like formula. Its words are: "If one party to a proceeding is domiciled in a State, the status of that party, as affected by the matrimonial relation, may be adjudged upon and confirmed or changed, in accordance with the laws of that State. But has not the State in which the other party named in the proceedings is domiciled, also the equal right to determine his status as thus affected, and to declare by law what may change it and what shall not change it?" p. 85, 86. Thereupon the opinion proceeds to answer this question in the affirmative, and to lay it down that New York has the same rights which it concedes to Ohio. "Of course," my reader will say, "the legislative and judicial action, or both, whereby New York determined the status of the man, Ohio having effectually divorced the woman, are, for the next thing, pointed out in the opinion." But reading onward to the close, he will find nothing of the sort. The power of war is shown, but neither a declaration pursuant thereto, nor actual hostilities, appear. This is the thing which was not thought of. Yet it did occur to the learned judge to observe: "It will prove awkward, and worse than that, afflictive and demoralizing, for a man to be a husband in name and under disabilities or ties in one jurisdiction, and single and marriageable in another," — the exact condition into which this decision plunged this man, who had done nothing to deserve it; then, for taking a wife when the court admitted he had none, it committed him to the State prison as guilty of polygamy! If, on the other side, the meaning of the court's admission is claimed to be merely that the man had no wife in New York, the answer is that in the facts of the case he had none elsewhere. The charge of polygamy was that, having a wife in Ohio, he married

another in New York; it was not that, having in New York one wife, he there married a second. *Bishop Stat. Crimes*, § 585; 1 *Hawk. P. C. Curw. ed. c. 32*, § 7. Yet the case would have been no different if the accusation had been that, having a wife in New York, he married another. In fact, the woman meant was in Ohio, and the result would have been the same if she had been in New York. For in the one case the same as in the other, the everywhere binding Ohio decree had made her single. Partly to repeat, there was no pretence that at the time of the second marriage he had anywhere any other than the former Ohio wife, and it was distinctly affirmed that the divorce had made this woman in Ohio single. Ohio was her domicil, and by the law of nations, which was therefore domestic law in New York (*ante*, § 6), one's status, as married or single, at the place of his domicil, is his accepted status in every other country. Vol. I. § 833, 837; *ante*, § 43, 44. "It is true," said Cassoday, J. in *Cook v. Cook*, 56 *Wis.* 195, 208, 43 *Am. R.* 706, 710, stated post, § 156, "when such status is once rightfully fixed by a State in which the person to whom it attaches resides, it necessarily follows the person, even though he goes into another State, and it continues with him until refixed by another rightful jurisdiction in which he has subsequently become a resident." Hereupon it is interesting to observe, though the question was not important and was not considered in this New York case, that if after the Ohio divorce this woman had removed to New York and become there domiciled, she would have been recognized by the courts there as a single woman, not only by force of the Constitution of the United States, but also because she was such when she left Ohio. The result would have been that the court, in deciding as it did, would have deemed her to be the man's wife while she had no husband, and would have deemed him to be husband to her while she was not wife to him; and when he married the other woman, would have adjudged, as it did in the actual case, that the marriage was

§ 155. **Perpetuating the Blunder.**—A little while after this, a case came before the New York Court similar, yet somewhat stronger, because there the defendant was the wife whose domicile might not improperly be deemed to be in the husband's State; and she had actual notice, and was present when depositions were taken at the place of her residence; yet the majority of the judges held the case just stated to be "conclusive of the question;" namely, that the marriage of this woman, which was celebrated in New York subsequently to the divorce, was void as being polygamous. The majority based their opinion simply on the *res judicata* reason, and the minority opinion made no allusion to the omitted thing explained in the last section.<sup>1</sup> Still later, the judicial mind remaining oblivious to the real question, the court declared that these two cases "are decisive upon this point, and bar the further discussion to which the appellant invites us."<sup>2</sup> So the highest tribunal of the most populous State in our Union, having shut its eyes, declares that it will never permit them to be opened and to see! Thus apparently, in this State, the gate is forever closed against the undiscovered light. Furthermore,—

§ 156. **The Oversight travelling.**—In a Wisconsin case, wherein an *ex parte* divorce rendered in Michigan was relied upon, the court followed the New York precedent of closing its eyes to the controlling consideration, therefore arrived at the like result; though perhaps all this matter might be deemed only *dictum*, the element of fraud which would have led to the same conclusion appearing also in the case. The learned judge who delivered the opinion deemed that, fraud aside, "under the laws of Michigan fixing, regulating, and controlling the status of its own citizens, of whom William had become one, he has been relieved by a court of that State of his former status of marriage, so far as to enable him to remarry without criminality in himself or the woman with whom the marriage might be contracted. But the question would still remain: What about the status of Ellen, who never was a resident or citizen of Michigan, but has all the while been a resident of Wisconsin, which also has the right, and is in duty bound, to fix, regulate, and control the status of its own

polygamous, being such by a fiction of law, while yet there was no subsisting joinder in marriage of a prior woman to him, either in fact or in law, to make it such. And see post, § 185.

<sup>1</sup> O'Dea v. O'Dea, 101 N. Y. 23.

<sup>2</sup> Cross v. Cross, 108 N. Y. 628, 630.

citizens? Has the jurisdiction in which William and Ellen both resided for many years as husband and wife, and in which Ellen still resides, lost all power of determining her marriage status, and her rights of property by reason of such status, merely because William has abandoned her and departed from the jurisdiction and entered another, the aid of which he successfully invoked in obtaining a secret divorce?"<sup>1</sup> Here the court states the never-doubted power of Wisconsin, and her equality with Michigan. Thereupon the question properly arose whether or not Wisconsin had undertaken to exercise this power by abrogating the universal law of the monogamous world, that a woman who has no longer a husband has ceased to be a wife. We have not a word from the court on this question, and the startling proposition is merely assumed, not set down in detail, that the Wisconsin laws are commensurate in wickedness and foolishness with the power of the State. Something like this, too, has been approximated in New Jersey.<sup>2</sup>

§ 157. **Appearance or Citation within Jurisdiction.** — Whatever be said of the blunderings stated in the last three sections, no doctrine assumed to be drawn from them is, by the courts participating, extended to a case wherein, though the parties are domiciled in different States, the non-domiciled defendant appears, or is cited within the jurisdiction of the divorcing court.<sup>3</sup> Yet in just principle, the fact of such appearance or citation does not help the divorce as respects the mere status. In all the region of the law, there is no such thing as a jurisdiction by reason of a control over both the parties, where there is none over the subject-matter. And the very objection on which the last three sections proceed, is that the court of the one State cannot determine the status of the person domiciled in the other, — the status being the subject-matter, and the lack of domicile being the jurisdictional defect. If the Ohio Court cannot, as it is assumed, change the status of a party domiciled in New York, on application of the other party domiciled in Ohio, the appearance of the New York party in the Ohio divorce suit helps nothing.<sup>4</sup> The New York law does not authorize a New York citizen to unmarry himself at will, whether with or without

<sup>1</sup> Cook v. Cook, 56 Wis. 195, 209, 210, 43 Am. R. 706.

<sup>2</sup> Doughty v. Doughty, 1 Stew. Ch. 581, 12 C. E. Green, 315; Flower v. Flower, 15 Stew. Ch. 152.

<sup>3</sup> Jones v. Jones, 108 N. Y. 415, 2 Am.

St. 447. And see the cases cited to the last three sections. Compare with ante, § 50, 55, 56.

<sup>4</sup> Van Fossen v. S. 37 Ohio St. 317, 41 Am. R. 507.

the aid of any private citizen or of any foreign tribunal ; and an appearance or a citation in a foreign court that has no power to fix the status of New York parties is without effect. To repeat in substance the language employed in the New York and Wisconsin cases before stated, "What becomes of the right of New York — what becomes of the right of Wisconsin — to determine the status of its citizen ?"

§ 158. **Importance.** — If the courts that have committed the oversight thus pointed out in the closing sections of this sub-title persist in refusing to look, thereby in violation of reason and justice making persons married in one State and single in another, and rendering what is holy wedlock in one State the door to the penitentiary in another, the amount of mischief they will do is beyond the power of any author to estimate. Of course, it is vain for a law-writer, who, whatever his merits or demerits, can only in a common-law country implore from a seat far beneath the bench, to proffer any words to incumbents of the bench who will not hear him. Should he undertake to explain to such incumbents that the rule of *stare decisis* does not apply to this sort of case, should he make this proposition plain beyond cavil, nothing can come from it if those to whom the appeal is made will not read. It is not possible to name any question in our law exceeding the present one in importance. Since we are a country composed of States, if judges will administer the law in a way to create a system of polygamy in all the States, and to lay in every State a trap-door to the penitentiary for people to fall into who are morally innocent, it is submitted that there should be a better foundation for such woe-breeding and demoralizing decisions than a refusal, assumed to be under the rule of *stare decisis*, to look when a blunder is pointed out. But the present author will close the discussion here ; because enough has already been shown to satisfy legal persons who will look and examine, and a multiplying of words could have no effect on others.

### III. *Over the Personal Rights of the Parties there is no Jurisdiction without Citation or Appearance.*

§ 159. **Already — Further on,** — in the chapter entitled "The Jurisdiction from Citation or Appearance,"<sup>1</sup> we have considered

<sup>1</sup> Ante, § 76-83.

the principles which govern the subject of this sub-title. Some of their applications are reserved for more appropriate places further on in this volume.

IV. *The Place of the Commission of the Offence is immaterial.*

§ 160. **Doctrine defined.**—Contrary to the rule in the criminal law, which gives a jurisdiction to the tribunals of the State or county in which an offence is committed,<sup>1</sup> the mere fact that a matrimonial wrong has transpired within the territorial limits of a divorce court confers on it no authority over the cause.<sup>2</sup> Even when the place of the offence is considered in connection with other facts, it is never by the just doctrine material to the jurisdiction; and so, with some exceptions or qualifications, the courts, English, Scotch, and American, hold.<sup>3</sup> *A fortiori*,—

§ 161. **County.**—The court in trying a divorce suit is not to limit the evidence, as in a criminal one, to facts which transpired within the county.<sup>4</sup>

§ 162. **Why?**—A criminal suit is for the punishment of breaches of good order in the community, and for the promotion of the public peace. And if one married party commits against the other a wrong within the cognizance of the criminal law, he is answerable for it to the courts of the county as for any other crime. But a divorce proceeding has an entirely different object. Ordinarily it is to abrogate, for the good of the community and of the parties, a subsisting marriage status. And in the reason of things the place at which the wrong was committed, and whether it was within the territorial limits or elsewhere, at home or in a foreign country, is wholly immaterial. A man going abroad to commit adultery is just as unfit a companion for his wife, the interests of society just as much require the dissolution of the marriage, and private interest calls as loudly for it, as though he did the wrong within the dominions of his own sovereign.

<sup>1</sup> 1 Bishop Crim. Proced. § 49; 1 Bishop Crim. Law, § 110, 111, 116.

<sup>2</sup> Ante, § 43-46; Stavert v. Stavert, 9 Scotch Sess. Cas. 4th ser. 519.

<sup>3</sup> 1 Burge Col. & For. Laws, 680; 1 Fras. Dom. Rel. 658; Duntze v. Levett, Ferg. 68, 3 Eng. Ec. 360, 379; Harding v. Alden, 9 Greenl. 140, 23 Am. D. 549;

Clark v. Clark, 8 N. H. 21; Harteau v. Harteau, 14 Pick. 181, 25 Am. D. 372; Thompson v. S. 28 Ala. 12; Hanberry v. Hanberry, 29 Ala. 719; Ratcliff v. Ratcliff, 1 Swab. & T. 467, 470; Brodie v. Brodie, 2 Swab. & T. 259; Holmes v. Holmes, 4 Lans. 388, 57 Barb. 305, 307.

<sup>4</sup> Jones v. Jones, 60 Tex. 451.

§ 163. **Effect of Statutes.** — In Kentucky — and there may be other States — there is or was a jurisdictional statute, not important to be here recited, working a slight change in this rule.<sup>1</sup>

*V. It is immaterial where the Domicil was when the Offence was committed.*

§ 164. **Doctrine defined.** — By the just doctrine, and by the practice nearly universal in our States, the place of the parties' domicil at the commission of the offence is immaterial to the jurisdiction. The courts of the new domicil can dissolve the marital status as well for what transpired before the change as after.

§ 165. **The Reasons** — for this are similar to those stated under the last sub-title. The laws of every country determine who are and who are not fit to dwell as companions in marriage. Divorce is to put asunder the unfit. Each State has its own policy. When parties appear as applicants for divorce, the question is whether or not, by the policy of the State, their marriage ought in view of the facts presented to be dissolved. The place of their domicil when they transpired, whether in the State or out of it, has no proper relevancy to this inquiry. If, by the policy of the State, it is deemed not fit for an adulterer to bind a pure wife to his bed, it is not made fit by the parties having lived in another State when the adultery complained of occurred.<sup>2</sup> There can be no question of the rightfulness, or of the constitutionality, of this doctrine; for, when married parties go into a State to abide, only of comity does the State accept their marital status.<sup>3</sup> Justly, then, is the condition of the acceptance deemed to be that there is nothing in the particular status making it voidable by the laws of the new domicil.

§ 166. **The Authorities** — sufficiently sustain this doctrine. Commonly it is tacitly accepted as of course, and upon it the cases silently proceed. But we have abundant adjudications more direct.<sup>4</sup>

<sup>1</sup> Hick v. Hick, 5 Bush, 670; Becket v. Becket, 17 B. Monr. 370. See Trevino v. Trevino, 54 Tex. 261.

<sup>2</sup> Vol. I. § 1482-1486, 1489.

<sup>3</sup> Ante, § 152, note.

<sup>4</sup> Lauder v. Vanghent, Ferg. 250, 3 Eng. Ec. 414; Gordon v. Englegraaf, Ferg. 251,

3 Eng. Ec. 415; Scott v. Boucher, Ferg. 252, 3 Eng. Ec. 416; Younge v. Cassa, Ferg. 255, 3 Eng. Ec. 417; Urquhart v. Flucker, Ferg. 259, 3 Eng. Ec. 420; Deane v. Deane, 12 Jur. 63; Collett v. Collett, 3 Curt. Ec. 726, 7 Eng. Ec. 563, 565; Tolen v. Tolen, 2 Blackf. 407;

In Louisiana, New Hampshire, and Pennsylvania, doctrines more or less adverse are maintained. Thus,—

§ 167. **Louisiana.**—It appears to be established in this State that emigrants from other countries, whose marriage and cohabitation transpired while they entertained no expectation of dwelling in Louisiana, cannot avail themselves of her divorce laws in respect of offences antecedently committed abroad.<sup>1</sup> But if a man domiciled in Louisiana marries abroad, then his wife commits a matrimonial offence abroad, the Louisiana Court will grant him the divorce.<sup>2</sup>

§ 168. **New Hampshire and Pennsylvania.**—In these two States, doctrines on this subject have become established through an original blunder.<sup>3</sup> The judges, discovering in Massachusetts some decisions which proceeded upon the peculiar Constitution and statutes of the State, and not observing that they were meant to be other than expositions of general doctrine, shut their eyes<sup>4</sup> and followed them. Of course they went wrong. Thus,—

§ 169. **Historical.**—In Massachusetts, under the colonial system, the power of divorce was with the Governor and council.<sup>5</sup> Then, in 1780, the State Constitution declared that “all causes of marriage, divorce, and alimony . . . shall be heard and determined by the Governor and Council until the legislature shall by law make other provision.”<sup>6</sup> Accordingly a statute was passed in 1786 as follows: “Whereas it is a great expense to the people of this State to be obliged to attend at Boston upon all questions of divorce, when the same might be done within the counties where the parties live, and where the truth might be better discerned by having the witnesses present in court, Be it therefore enacted, &c., That all questions of divorce and alimony shall be heard and tried by the Supreme Judicial Court, holden for the county where the

Schnauffer v. Schnauffer, 4 La. An. 355; Fishli v. Fishli, 2 Litt. 337; Hare v. Hare, 10 Tex. 355; Hubbell v. Hubbell, 3 Wis. 662, 62 Am. D. 702. The case of McNeil v. McNeil, 3 Edw. Ch. 550, turned entirely upon the construction of the statute. See also Jarvis v. Jarvis, 3 Edw. Ch. 462; Holmes v. Holmes, 4 Lans. 388, 57 Barb. 305, 306; Stokes v. Stokes, 1 Misso. 320. And see, under statutes, Hick v. Hick, 5 Bush, 670; Becket v. Becket, 17 B. Monr. 370.

<sup>1</sup> Edwards v. Green, 9 La. An. 317, 318; Buchanan, J. dissenting; Muller v. Hilton, 13 La. An. 1, 71 Am. D. 504. The doctrine of which two cases is stated in D'Auvilliers v. Her Husband, 32 La. An. 605, 606. And see Hare v. Hare, 10 Tex. 355, 357.

<sup>2</sup> D'Auvilliers v. Her Husband, supra.

<sup>3</sup> Compare with ante, § 154–156.

<sup>4</sup> Ante, § 28, 29, 154.

<sup>5</sup> Gage v. Gage, 2 Dane Abr. 309.

<sup>6</sup> Const. Mass. c. 3, art. 5. See Vol. I. § 821, note, 1455.



parties live, and that the decree of the same court shall be final.”<sup>1</sup> While this provision seemed plain, and was practically so where the parties were living in the same county both when the offence was committed and when the divorce was applied for, difficulties of construction arose where they had no permanent domicil, or where they had made a change from one county to another, or where they were dwelling in different counties, or where only one of them was within the State; for while the letter of the statute left them no forum when both did not live in the same county, its spirit and intent evidently aimed to facilitate divorce; whence a strict construction could not be adopted; neither, on the other hand, could the letter be disregarded. And the courts naturally endeavored to find some principle or set of principles to guide the application, to this enactment, of the ever-varying facts under which the question presented itself. An obvious proposition was that a wife could not lose her forum by the desertion of the husband, or any change of residence by him alone, after the commission of the offence; but though in such a case she might proceed in the county where she continued to reside, it was not so clear she could gain, adversely to him, a new jurisdiction. These are observations simply upon the statute, having nothing to do with the unwritten rule.<sup>2</sup> Yet it is apparent, on a reference to the Pennsylvania<sup>3</sup> and New Hampshire<sup>4</sup> decisions, that such and similar observations from the Massachusetts Court are the real source of all their holdings contrary to the general American doctrine as expressed at the opening of this sub-title. Now, —

§ 170. **New Hampshire and Pennsylvania Doctrine, defined.** — The doctrine in these States, not taking into the account a later Penn-

<sup>1</sup> Mass. Stat. March 16 (c. 69), 1786, § 3; *Harteau v. Harteau*, 14 Pick. 181, 25 Am. D. 372.

<sup>2</sup> The following are some of the cases decided upon the construction of this statute: *Lane v. Lane*, 2 Mass. 167; *Richardson v. Richardson*, 2 Mass. 153; *Hopkins v. Hopkins*, 3 Mass. 158; *Squire v. Squire*, 3 Mass. 184; *Moore v. Moore*, 2 Mass. 117; *Merry v. Merry*, 12 Mass. 312; *Choate v. Choate*, 3 Mass. 391; *Anonymous*, 5 Mass. 197; *Harteau v. Harteau*, 14 Pick. 181, 25 Am. D. 372; *Greene v. Greene*, 11 Pick. 410; *Carter v. Carter*, 6 Mass. 263. And see *Harding v. Alden*, 9

*Greenl.* 140, 23 Am. D. 549. These adjudications were the foundation for the provisions in the Revised Statutes, c. 76, § 8-11. See Commissioners' Report, part 2, p. 121; post, § 197.

<sup>3</sup> *Dorsey v. Dorsey*, 7 Watts, 349; *McDermott's Appeal*, 8 Watts & S. 251; *Hollister v. Hollister*, 6 Pa. 449.

<sup>4</sup> *Clark v. Clark*, 8 N. H. 21; *Fellows v. Fellows*, 8 N. H. 160; *Frary v. Frary*, 10 N. H. 61, 32 Am. D. 395; *Greenlaw v. Greenlaw*, 12 N. H. 200; *Batchelder v. Batchelder*, 14 N. H. 380; *Smith v. Smith*, 12 N. H. 80; *Payson v. Payson*, 34 N. H. 518.

sylvania statute, is that the tribunals of the country where the parties were domiciled when the *delictum* occurred have alone the jurisdiction.<sup>1</sup>

§ 171. **Criticised in New Hampshire — Not applied to Divorce abroad.** — After this rule had become too firmly established in New Hampshire to be judicially overturned, the court deemed it to be unsound in general jurisprudence, therefore limited its application to the domestic jurisdiction. So that a divorce had in another State in denial of this rule, yet in compliance with the one with which this sub-title opened, was held to be good. The question before the court being, whether or not an Indiana divorce was valid, procured by the husband for an offence occurring while the parties were domiciled in New Hampshire, where the wife continued to reside, only the constructive notice having been given her, the court, by Sawyer, J., said: "Upon every view which can be taken of the case, the divorce in Indiana might be sustained in the courts of this State if the fact appeared that the husband, at the time of the application and of the proceedings which resulted in the decree, was a *bona fide* resident of that State."<sup>2</sup>

§ 172. **New Hampshire and Pennsylvania compared.** — There have been slight differences in the application of the rule in these two States. In Pennsylvania, in the words of Gibson, C. J., it was put upon the ground that "the person of the transgressor was not subject to our jurisdiction at the time of the fact."<sup>3</sup> But the New Hampshire Court does not require this element; and it gave a wife her divorce for an offence which the husband, after deserting her in New York, committed in another State where he was domiciled; she being then, and while the judicial proceedings were carried

<sup>1</sup> Cases cited to the last section; Norris v. Norris, 64 N. H. 523. In Foss v. Foss, 58 N. H. 283, 284, Allen, J. states the doctrine with the authorities as follows: "To entitle the court to take jurisdiction of a cause of divorce, the libellant must have an actual *bona fide* residence in the State. Fellows v. Fellows, 8 N. H. 160; Greenlaw v. Greenlaw, 12 N. H. 200; Batchelder v. Batchelder, 14 N. H. 380; Payson v. Payson, 34 N. H. 518. And the cause of divorce, if arising out of the State, must have been at a time when the domicile of the libellant was in the State. Clark v. Clark, 8 N. H. 21; Frary v. Frary, 10 N. H. 61, 32 Am. D. 395; Smith v. Smith,

12 N. H. 80; Kimball v. Kimball, 13 N. H. 222, 225; Hopkins v. Hopkins, 35 N. H. 474; Leith v. Leith, 39 N. H. 20, 32, 33." It was held that the statute of 1883, c. 14, to prevent fraudulent divorces, does not enlarge the jurisdiction; therefore a plaintiff living out of the State has no standing in court. Kimball v. Kimball, 63 N. H. 598.

<sup>2</sup> Leith v. Leith, 39 N. H. 20, 41.

<sup>3</sup> Dorsey v. Dorsey, 7 Watts, 349, 352. "There is no question that the courts here have no jurisdiction of marital duties abroad." McDermott's Appeal, 8 Watts & S. 251, 256.

on, resident in New Hampshire. "Having lawfully come to reside here," observed Parker, C. J., "she was entitled to the protection of our laws; and a violation of the marriage covenant having subsequently occurred, she, as a legal inhabitant, may well appeal to those laws for redress." In this case, the place of the marriage was New Hampshire, a fact which probably did not influence the result.<sup>1</sup>

§ 173. **Legislative Change in Pennsylvania.** — Later, a statute in Pennsylvania undertook to change this rule. Whether the statute still remains unaltered the writer has not deemed it important to practitioners out of the State to inquire, and those in the State have the surer guide of their own statute-books. It declared it to be "lawful for the said several courts to entertain jurisdiction of all causes of divorce from the bonds of matrimony, for the causes of desertion as aforesaid, or adultery, notwithstanding the parties were, at the time of the occurrence of said causes, domiciled in any other State. Provided, That no such divorce shall be granted unless the applicant therefor shall be a citizen of this commonwealth, or shall have resided therein for the term of one year, as provided for by existing laws." But the court by interpretation compressed the legislative command within the narrowest possible limits, restricting the words "any other State" to the States of our Union;<sup>2</sup> and by way of *dicta*, not, it is believed, by decision, it has refused to apply the same rule which the statute has prescribed for its own jurisdiction, to divorces pronounced in other States.<sup>3</sup>

## VI. *It is immaterial where the Marriage was celebrated.*

§ 174. **Doctrine defined.** — It is special to the nature of marriage that, though entered into under the local law of a particular country, it is a status in international law,<sup>4</sup> yet subject to be modified or dissolved by the sovereign power of any country wherein the parties may thereafter have a domicil.<sup>5</sup> Whence it results that their citizenship, the place of solemnization, the laws of the country either of such citizenship or such solemnization as allowing or forbidding divorce, are, severally and collectively, immaterial

<sup>1</sup> Frary v. Frary, 10 N. H. 61, 32 Am. D 395. See also Clark v. Clark, 8 N. H. 21; Greene v. Greene, 11 Pick. 410, 415.

<sup>2</sup> Bishop v. Bishop, 30 Pa. 412, 416; Act of 26th April, 1850, § 6.

<sup>3</sup> Colvin v. Reed, 55 Pa. 375; Reel v. Elder, 62 Pa. 308. Compare with ante, § 171.

<sup>4</sup> Vol. I. § 833, 836, 838, 843.

<sup>5</sup> Ante, § 41-75.

to the divorce jurisdiction. Such is the clear doctrine of principle. And —

§ 175. **In Authority**, — such is the unquestioned law throughout the United States;<sup>1</sup> with perhaps the exception of South Carolina,<sup>2</sup> in which State divorce is unknown.<sup>3</sup> Of course, when we look upon marriage as a status, subject to the control of the laws of the State in which the parties live, there is no possible room for an argument against this doctrine. But the doctrine is sound also even —

§ 176. **Assuming Marriage a Contract** — If, following the old definitions, we contemplate marriage as a contract,<sup>4</sup> still we do not reach the result that when parties enter into it in a country not permitting divorce, it is therefore indissoluble in other countries. By changing their domicil they voluntarily place this contract, with their persons, under the new laws; so they cannot object if it is brought to an end by those laws, and the sovereignty of no other country, even the old one, has any interest to complain. Moreover, as said in the Missouri Court: “The laws of a country where a marriage is contracted form no part of the contract of marriage. By a contract, always implied, between the government and the community, each member agrees to submit to laws made for the whole, and the husband and wife are as much bound by this implied contract as each individual is. If they elect to

<sup>1</sup> Dorsey v. Dorsey, 7 Watts, 349; Tolen v. Tolen, 2 Blackf. 407; Clark v. Clark, 8 N. H. 21; Barber v. Root, 10 Mass. 260; Harteau v. Harteau, 14 Pick. 181, 25 Am. D. 372; White v. White, 5 N. H. 476; Harrison v. Harrison, 19 Ala. 499; Thompson v. S. 28 Ala. 12; Standridge v. Standridge, 31 Ga. 223. It has, moreover, always been customary to take jurisdiction in divorce suits without any reference to the country where the marriage was solemnized; and the rightfulness of the practice has not been questioned. The following cases are illustrative: Langstaff v. Langstaff, Wright, 148; Maguire v. Maguire, 7 Dana, 181; Hesler v. Hesler, Wright, 210; Hansel v. Hansel, Wright, 212; Guembell v. Guembell, Wright, 226. See also Wells v. Thompson, 13 Ala. 793, 48 Am. D. 76; Harman v. Harman, 1 Cal. 215.

<sup>2</sup> Vol. I. § 58, 59.

<sup>3</sup> South Carolina. — We appear not

to have any very recent utterances from this State. At a time when misinterpretations of Lolley's Case were in vogue in England, Dunkin, Ch. said: “In reference to a South Carolina marriage, it has been often repeated, although never formally decided, that the doctrine of Lolley's Case is the law of this State. . . . The argument seems irresistible that in such cases the *lex loci contractus*, the law of the place where the marriage is celebrated, furnishes the just rule for the interpretation of its obligations and rights; as it does in the case of other contracts. It can only be dissolved by the law under which it was formed, and by which both parties understood it to be governed.” Hull v. Hull, 2 Strob. Eq. 174, 177, 178. And subsequently this doctrine received more direct judicial sanction. Duke v. Fulmer, 5 Rich. Eq. 121.

<sup>4</sup> Vol. I. § 11, 20, 22.

abandon France, their native country, and to take up their residence in Missouri, they thereby enter into an implied contract with the State of Missouri that the property left undisposed of on the death of one of the parties shall be disposed of agreeably to the general law of the land. It would be as unreasonable for such persons to introduce the laws of France here to regulate the descent and distribution of their property, as for a native of France who had abandoned his country at the age of maturity, when the implied contract between him and his country was in full vigor, to bring along with him the laws of France to be tried under if it should ever so happen that he committed murder within the jurisdiction of Missouri. The argument derived from the indissolubility of the marriage contract by the mere act of the parties has as little weight in it.”<sup>1</sup>

§ 177. In England — (*Lolley's Case*) — formerly marriage was judicially indissoluble, though in very special circumstances the bond was severed by legislation.<sup>2</sup> And during this long non-divorce period, the English judges entertained a sort of reverence for an English marriage, as being something too exalted for

<sup>1</sup> Tompkins, J. in *S. v. Fry*, 4 Misso. 120, 198. A learned Scotch judge observed: “By marrying in England, parties do not become bound to reside forever in England, or to treat one another in every other country where they may reside according to the provision of the law of England. Their obligation is to fulfil the duties of husband and wife to each other in whatsoever country they may be called to in the course of providence; and they neither promise, nor have power to engage, that they shall carry the law of England along with them to regulate what the duties and powers are which they shall fulfil and exercise, or the redress which the violation of those duties, or abuse of those powers, may entitle to. All of these functions belong to the law of the country where they may eventually reside, and to which they unquestionably contract the duties of obedience and subjection whenever they enter its territories. And, further, this supposed condition, even if it had the will of the parties in favor of it by any stipulation, however express, could derive no force from that circumstance.

It is too obvious to admit of doubt that no quality can be created in the relation of husband and wife by positive or implied agreement. The commissaries certainly would not dismiss an action of divorce because the parties at intermarrying had in the most formal manner renounced the benefit of it, and become bound that their marriage should be indissoluble. Nor would it be any objection to a divorce, at the instance of a Roman Catholic, that his marriage was to him a sacrament and therefore by its own nature indissoluble. These are all *pacta privatorum*, and cannot impede or embarrass the steady, uniform course of the *jus publicum*, which, with regard to the rights and obligations of individuals affected by the three great domestic relations, enacts them from motives of political expediency and public morality, and nowise confers them as private benefits resulting from agreements concerning *meum et tuum*, which are capable of being modified and renounced at pleasure.” Opinion of Mr. Commissary Ross, Ferg. 359, 3 Eng. Ec. 480.

<sup>2</sup> Vol. I. § 1424, 1425.

anything lower than the omnipotent act of Parliament to touch. Thereupon came the celebrated Lolley's Case: it occurred while, contrary to the present Scotch law,<sup>1</sup> the Scotch courts took jurisdiction to divorce parties without a domicil. A couple who had been married in England, and whose domicil was all the while there, procured a divorce *a vinculo* from a Scotch court. Then the man married another woman, and he was indicted in England for polygamy. Relying upon this divorce in defence, he was convicted, and the judges held the conviction to be right; affirming, as all would now say, the doctrine that internationally there can be no divorce without domicil.<sup>2</sup> But the brief reports which we have of this case put the matter in a different form of words; stating the judgment to be, "that no sentence or act of any foreign country or State could dissolve an English marriage *a vinculo matrimonii*, for ground on which it was not liable to be dissolved, *a vinculo matrimonii*, in England."<sup>3</sup> Further as to which, —

§ 178. **More of Lolley's Case — Later.** — It is hardly presumable that the judges, whose exact words the report does not pretend to give, really employed simply these words and no more. But if they did, still they had no jurisdiction to travel beyond the record, and lay down any doctrine other than in response to the facts; or, if they had such jurisdiction, their decision can be properly understood only by enlarging their words by adding the facts as qualifications and limitations of the meaning.<sup>4</sup> Yet for a long series of years it was the common course in the English courts to speak of Lolley's Case as almost or as quite authority for the proposition that, for English purposes, no English marriage could be dissolved by any foreign tribunal, however the parties might be domiciled and appearing within its jurisdiction.<sup>5</sup> But this

<sup>1</sup> Ante, § 61-65.

<sup>2</sup> Ante, § 50.

<sup>3</sup> *Rex v. Lolley*, Russ. & Ry. 237, 2 Cl. & F. 568, note, A. D. 1812. Lord Brougham, who was counsel for the prisoner, stated the next year before the House of Lords, while as counsel arguing the case of *Tovey v. Lindsay*, 1 Dow, 117, 127, that he had a note of Lolley's Case, taken by himself at the time the judgment was delivered; as follows, that the judges "were unanimously of opinion upon the points reserved, that a marriage solemnized in England was indissoluble

by anything except an act of the legislature."

<sup>4</sup> Bishop Non-Con. Law, § 1320, 1325. And see observations of Lord Bannatyne in *Duntze v. Levett*, Ferg. 403, 3 Eng. Ec. 506; Vol. I. § 111.

<sup>5</sup> Consult, for example, *McCarthy v. Decaix*, 2 Russ. & Myl. 614, 2 Cl. & F. 568, note, 3 Hag. Ec. 642, note, 5 Eng. Ec. 244; *Warrender v. Warrender*, 2 Cl. & F. 488, 9 Bligh n. s. 89; *Conway v. Beazley*, 3 Hag. Ec. 639, 5 Eng. Ec. 242; *Tovey v. Lindsay*, 1 Dow, 117.

view of the case is now abandoned, and the doctrine thus built up upon it has nearly, perhaps fully, disappeared from the English tribunals. It will be hardly compensatory to undertake to inquire further what the authoritative English law on the question now is; the courts have travelled far toward the true rule, whether they have reached it or not.<sup>1</sup>

VII. *The Foregoing Propositions are not in Conflict with the United States Constitution.*

§ 179. **Obligation of Contracts.** — The only provision of the Constitution of the United States which, with any show of reason, could be claimed to conflict with the foregoing doctrines is the one forbidding the States to “pass any law impairing the obligation of contracts.” To such a claim there are various answers. The one absolutely satisfactory, rendering unnecessary any examination of the others, is that, as now settled beyond dispute, this clause of the Constitution has no relation to marriage and divorce. Marriage is not a contract within its meaning.<sup>2</sup>

VIII. *As between the States, the United States Constitution and Decisions make the Foregoing Doctrines binding on all State Tribunals.*

§ 180. **Doctrine defined.** — By force of the Constitution and statutes of the United States, whenever, according to the principles of international and interstate law, a State court has jurisdiction of a cause of divorce, its divorce sentence has in every other State the same effect which, by the laws of the State of its rendition, it has there. The sole power to grant divorces within the States is in the State tribunals, from which there is no appeal;<sup>3</sup> but when a divorce sentence has been validly rendered, it is protected as

<sup>1</sup> Harvey v. Farnie, 5 P. D. 153, 156, 6 P. D. 35, 8 Ap. Cas. 43; Shaw v. Gould, Law Rep. 3 H. L. 55; Shaw v. Attorney-General, Law Rep. 2 P. & M. 156. See ante, § 52-57.

<sup>2</sup> Vol. I. § 30, 1430-1434; Dartmouth College v. Woodward, 4 Wheat. 518, 629, 695; Tolen v. Tolen, 2 Blackf. 407; Maguire v. Maguire, 7 Dana, 181; Berthelemy v. Johnson, 3 B. Monr. 90, 38 Am. D. 179;

Opinion of Supreme Judicial Court, 16 Me. 481; Starr v. Pease, 8 Conn. 541; Jones v. Jones, 2 Tenn. 2, 5 Am. D. 645; Bingham v. Miller, 17 Ohio, 445, 447, 49 Am. D. 471; Levins v. Sleator, 2 Greene, Iowa, 604; Noel v. Ewing, 9 Ind. 37. And see Leith v. Leith, 39 N. H. 20; Starr v. Hamilton, Deady, 268.

<sup>3</sup> Vol. I. § 155; Roth v. Ehman, 107 U. S. 319.

to its effect by the National Constitution, the ultimate interpreter and guardian whereof is the Supreme Court of the United States.<sup>1</sup> To particularize, —

§ 181. **Constitutional and Statutory Provisions.** — By the United States Constitution: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and *the effect thereof*."<sup>2</sup> So that, notwithstanding the expression "full faith and credit," with which this provision opens, it closes by declaring that Congress shall prescribe what the "effect" shall be. This was done almost immediately on the adoption of the Constitution, by act of 26th May, 1790. The words are (after directing how the State records and proceedings shall be verified): "And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States *as they have by law or usage in the courts of the State from whence the said records are or shall be taken*."<sup>3</sup> Here is an act of Congress passed by constitutional command, therefore apparently of equal authority with the Constitution itself. Or if it is looked upon as an interpretation of the Constitution, which in part it may perhaps be, we have here the familiar doctrine that though a congressional interpretation is not in any absolute sense binding, this is a contemporaneous one,<sup>4</sup> always greatly regarded, and long acceptance of it by the courts has rendered it conclusive.<sup>5</sup> But —

§ 182. **Jurisdiction.** — We saw in a preceding chapter that by the principles alike of interstate and domestic law, no judicial proceeding or judgment can have any validity without a jurisdiction in the tribunal.<sup>6</sup> This is a matter on which the National Constitution and statute are silent; but they came into being as additions to our already existing legal system, with which they

<sup>1</sup> And see *Ditson v. Ditson*, 4 R. I. 87, 107; *P. v. Baker*, 76 N. Y. 78, 83, 84, 32 Am. R. 274.

<sup>2</sup> Const. U. S. art. 4, § 1.

<sup>3</sup> 1 U. S. Stats. at Large, p. 122, c. 11. In connection with this, see Stat. March 27, 1804; *Bigelow Estoppel*, 196. The provision is now embodied with slight verbal changes in U. S. Rev. Stats. § 905.

Compare with Vol. I. § 1132, where the terms of the Revised Statutes are given.

<sup>4</sup> Bishop Written Laws, § 104.

<sup>5</sup> 2 Story Const. § 1311-1313; *Mills v. Duryee*, 7 Cranch, 481; *McElmoyle v. Cohen*, 13 Pet. 312, 325; and numerous other cases.

<sup>6</sup> *Ante*, § 4, 5.



mingled and by which they must be interpreted.<sup>1</sup> Or if this were not so, plainly the meaning could not be that whenever a State court, whether by legislative command or not, should take jurisdiction, its judgment must be accepted as conclusive in all the other States; for that would put it into the power of any State to extend its rule over the inhabitants of all the others, and ruin them by proceedings to which they were not properly subject, and of which they had no knowledge. Hence the rule has become established that to give a State judgment the effect prescribed, the court must have jurisdiction<sup>2</sup> within the principles of international and interstate jurisprudence.<sup>3</sup> For example, in an ordinary suit *in personam*, there must be notice to the defendant, served within the State, or an appearance;<sup>4</sup> in a proceeding *in rem*, the constructive notice will suffice.<sup>5</sup> The authorities to these propositions are both divorce and other adjudged cases. More specifically as to —

§ 183. **Divorce Jurisdiction.** — In the preceding sub-titles, we saw what, by the principles of interstate jurisprudence, will give a divorce court jurisdiction in a particular controversy. And we here see that when it has such jurisdiction, not otherwise, its sentence becomes authoritative over all the tribunals of all the other States, to precisely the same extent as in the State of its rendition. Already the leading principles of the foregoing sub-titles, for the determination of the jurisdiction, have been affirmed by the Supreme Court of the United States. For example, the wife may have for divorce a domicile separate from her husband's,<sup>6</sup> and the tribunals of either domicile may dissolve the marital status of the party in the State, though only the constructive notice could

<sup>1</sup> Bishop Written Laws, § 4, 5, 7, 82, 86, 92, 92 *a*.

<sup>2</sup> And see *Barrett v. Oppenheimer*, 12 Heisk. 298; *Corby v. Wright*, 4 Mo. Ap. 443; *Jardine v. Reichert*, 10 Vroom, 165; *Boone v. Poindexter*, 12 Sm. & M. 640.

<sup>3</sup> *Morey v. Morey*, 27 Minn. 265; *Cole v. Cunningham*, 133 U. S. 107, 112; *Johnson v. Johnson*, 67 How. Pr. 144; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. R. 132; *Mitchell v. Ferris*, 5 Del. 34; *D'Arcy v. Ketchum*, 11 How. U. S. 165; *Sumner v. Marcy*, 3 Woodb. & M. 105; *Lincoln v. Tower*, 2 McLean, 473.

<sup>4</sup> Ante, § 76, 77; *Pennoyer v. Neff*, 95 U. S. 714; *Mayhew v. Thatcher*, 6 Wheat.

129; *D'Arcy v. Ketchum*, 11 How. U. S. 165; *Wilson v. Graham*, 4 Wash. C. C. 53.

<sup>5</sup> Ante, § 76, 77, 140-142; *Pennoyer v. Neff*, supra; *Ennis v. Smith*, 14 How. U. S. 400, 430; *Peters v. Warren Ins. Co.* 3 Sumner, 389; *Magoun v. New England Marine Ins. Co.* 1 Story, 157; *Bradstreet v. Neptune Ins. Co.* 3 Sumner, 600; *Woodruff v. Taylor*, 20 Vt. 65; *Stewart v. Warner*, 1 Day, 142, 2 Am. D. 61; *Williams v. Armroyd*, 7 Cranch, 423; *Hickey v. Stewart*, 3 How. U. S. 750.

<sup>6</sup> *Barber v. Barber*, 21 How. U. S. 582; *Cheever v. Wilson*, 9 Wal. 108.

be or was given to the other party;<sup>1</sup> the proceeding being, as to such status, *in rem*. And where there is no international authority over the *res*,—for example, where neither party has a domicile in the State of the court,<sup>2</sup>—no doubt remains that any divorce sentence will be universally void. But there is a question as to the effect of a—

§ 184. **Judgment falsely stating Jurisdictional Fact.**—The judgment of a court of record, whether in a divorce case or any other, is *prima facie* presumed to be on sufficient jurisdiction and valid.<sup>3</sup> But any defect affirmatively appearing will render it invalid.<sup>4</sup> If the record falsely asserts jurisdictional facts, where in truth the court was without authority, they are open to contradiction in the other State, whereupon the judgment will become a nullity. Otherwise the court would be in the position of a man who should record himself elected sovereign of the world, then confirm all by his decree as sovereign. And so the decisions are now, upon a question which has sometimes been decided the other way.<sup>5</sup> There are cases wherein the recitals of the record, perhaps as to what in a minor sense may be called jurisdictional, are not within this principle, therefore are everywhere conclusive.<sup>6</sup> Further as to this doctrine in—

§ 185. **Ex Parte Divorces.**—We have devoted an entire subtitle to a careful consideration of this subject.<sup>7</sup> By the terms of the act of Congress, the “faith and credit” to be given records of

<sup>1</sup> *Pennoyer v. Neff*, 95 U. S. 714.

<sup>2</sup> *P. v. Dawell*, 25 Mich. 247, 12 Am. R. 260; *Wright v. Wright*, 24 Mich. 180; *Sewall v. Sewall*, 122 Mass. 156, 23 Am. R. 299; *Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. R. 299; *Kerr v. Kerr*, 41 N. Y. 272; *Hood v. S.* 56 Ind. 263, 26 Am. R. 21; *Litowich v. Litowich*, 19 Kan. 451, 27 Am. R. 145. And see *Smith v. Smith*, 13 Gray, 209; *C. v. Blood*, 97 Mass. 538; *Mellen v. Mellen*, 10 Abb. N. Cas. 329; *Van Fossen v. S.* 37 Ohio St. 317, 41 Am. R. 507.

<sup>3</sup> 1 Bishop Crim. Proced. § 236, 658, 664; *Gunn v. Peakes*, 36 Minn. 177, 1 Am. St. 661; *Miller v. Leach*, 95 N. C. 229. See *Wertz v. Wertz*, 11 Mo. Ap. 26.

<sup>4</sup> *Morey v. Morey*, 27 Minn. 265; *Werner v. Werner*, 30 Ill. Ap. 159.

<sup>5</sup> *Thompson v. Whitman*, 18 Wal. 457; *Pennoyer v. Neff*, 95 U. S. 714, 730, 731;

*Hill v. Mendenhall*, 21 Wal. 453; *Knowles v. Gaslight and Coke Co.* 19 Wal. 58; *Bowler v. Huston*, 30 Grat. 266, 32 Am. R. 673; *P. v. Dawell*, 25 Mich. 247, 12 Am. R. 260; *Kerr v. Kerr*, 41 N. Y. 272; *Sewall v. Sewall*, 122 Mass. 156, 23 Am. R. 299; *Marx v. Fore*, 51 Mo. 69; *Eager v. Stover*, 59 Mo. 87; *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. R. 589; *Van Fossen v. S.* 37 Ohio St. 317, 319, 41 Am. R. 507; *Gregory v. Gregory*, 78 Me. 187, 190, 57 Am. R. 792; *Bodurtha v. Goodrich*, 3 Gray, 508; *Mitchell v. Ferris*, 5 Del. 34; *Chaney v. Bryan*, 15 Lea, 589; *Reed v. Reed*, 52 Mich. 117, 50 Am. R. 247. See *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. R. 132.

<sup>6</sup> *Todd v. Crumb*, 5 McLean, 172; *Allison v. Chapman*, 19 Fed. Rep. 488; *Waldo v. Waldo*, 52 Mich. 94.

<sup>7</sup> Ante, § 131-158.

this sort are the same which "they have by law or usage in the courts of the State" whence extracted. The provision binds "every court within the United States."<sup>1</sup> It is interpreted to mean what it says. The court in the other State will by proper methods<sup>2</sup> ascertain what are the laws and usages of the State whence the record was taken, and then give it, not the effect accorded a like domestic record by the laws of its own State, but the effect it has in the State where made. This distinction, plain in the words of the statute, has been carefully noted and insisted on by the courts.<sup>3</sup> If, then, a wife domiciled in Ohio obtains an *ex parte* divorce from her husband domiciled in New York, the New York Court is not permitted to say that her status has been reduced to non-marital *as to Ohio*, but it remains marital *as to New York*. If the effect of the sentence is, in Ohio, to make her a single woman there, its effect is also, and equally, and to exactly the same extent, to make her a single woman in New York. And such she is made in all the other States in the Union. Nor can New York, by any power, legislative or judicial, at any future time, remarry her to the former husband, or hold her to be or treat her as his wife, unless she becomes domiciled in the State. And should she become so domiciled, still she must be deemed to have been single after the divorce; until by some act, operating as though she had never been married, she is freshly made, under the New York law, a wife.

### IX. *Some Minor Questions.*

§ 186. **Fraud** — in the divorce proceedings and sentence requires a special consideration. It is for a chapter further on.<sup>4</sup>

§ 187. **Estoppel**. — It is plain in principle that since divorce is a public concern, and the State is a silent party to every divorce suit, and agreements for divorce and confessions are never accepted as alone foundation for dissolution,<sup>5</sup> there cannot be a divorce jurisdiction by consent.<sup>6</sup> And the principle on which this proposition proceeds would seem to exclude estoppel as either

<sup>1</sup> Ante, § 181.

<sup>2</sup> Vol. I. § 1093, 1094, 1103; Beal v. Smith, 14 Tex. 305.

<sup>3</sup> Nichols v. Nichols, 10 C. E. Green, 60; Caldwell v. Carrington, 9 Pet. 86, 101; Hampton v. McConnel, 3 Wheat. 234; Mills v. Duryee, 7 Cranch, 481; McJilton

v. Love, 13 Ill. 486, 54 Am. D. 449; McLaren v. Kehler, 23 La. An. 80, 81, 8 Am. R. 591.

<sup>4</sup> Post, c. 47.

<sup>5</sup> Vol. I. § 72-76.

<sup>6</sup> See something of this, ante, § 55, 56.

giving or taking away such jurisdiction. The question has not been much considered by the courts; still we have some intimations, not all of which are quite beyond question, such as that a plaintiff who has accepted the benefit of a divorce decree cannot deny the authority of the court by which it was rendered.<sup>1</sup> On the other hand, it has been held that one who has obtained such decree is not estopped to deny its validity.<sup>2</sup> And there are plainly circumstances wherein, not speaking now specially of jurisdiction, one will not be permitted to set up that he is not divorced.<sup>3</sup> It should be remembered that estoppels *in pais* are only in part limited to cases in which the person could do the same thing by contract.<sup>4</sup> The books contain some decisions other than those here referred to,<sup>5</sup> but it is believed that no minuter discussion of the subject will furnish the reader much practical help.

§ 188. **Suits in Two States.** — In an ordinary controversy *in personam*, the pendency of a suit in one State does not oust the jurisdiction of another State over the same cause.<sup>6</sup> The rule also plainly applies to divorce. But in a divorce case there can never be a jurisdiction in more than two States; namely, those of the wife's and the husband's domicil.

§ 189. **Minor's Divorce Domicil.** — Where an infant girl, in fact residing in New Jersey, but in law domiciled in Canada because her parents dwelt there, was in New Jersey enticed into a form of marriage to a man who lived in another State, and she applied to the New Jersey Court to have it declared void for alleged fraud, jurisdiction was declined.<sup>7</sup> It is perceived that if she took her assumed husband's domicil on the ground of the marriage being good, it was not in New Jersey; if her father's, on the assumption of the marriage being void, still it was not in New Jersey. And yet, if the law gives to a minor the same as to a married woman the right to sue for a divorce, it would not be quite without reason to contend that, as in the case of the married woman,<sup>8</sup> it carries by implication a jurisdiction for the purpose.

<sup>1</sup> Ellis v. White, 61 Iowa, 644. See Loud v. Loud, 129 Mass. 14; Elliott v. Wohlfrom, 55 Cal. 384.

<sup>2</sup> Holmes v. Holmes, 4 Lans. 388; Smith v. Smith, 13 Gray, 209.

<sup>3</sup> For example, Vol. I. § 1470.

<sup>4</sup> Bishop Con. § 301, 304, 309, 903, 1023; 2 Bishop Mar. Women, § 486, 488-490, 492.

<sup>5</sup> For example, Hardy v. Smith, 136 Mass. 328; Vol. I. § 74.

<sup>6</sup> Davis v. Morriss, 76 Va. 21; Hatch v. Spofford, 22 Conn. 485, 58 Am. D. 433, and note at the latter place.

<sup>7</sup> Blumenthal v. Tannenholz, 4 Stew. Ch. 194. See Doughty v. Doughty, 1 Stew. Ch. 581.

<sup>8</sup> Ante, § 116.

§ 190. *The Doctrine of this Chapter restated.*

The law prevailing at the domicile of the parties creates, sustains, and dissolves marriage. True, in mere form, a marriage celebrated elsewhere than at the domicile is good, for the law of the domicile makes it such. But such law never permits a foreign court to divorce the parties. Out of this proposition grows the rule that the divorce jurisdiction is at the domicile, not elsewhere. And from this central doctrine the various other propositions of this chapter proceed. This central doctrine could not be true if the place of the marriage, the domicile of the parties at the time of the *delictum*, or the original form of the marriage agreement had anything to do with the question. Husband and wife having for divorce purposes separate domicils, if those domicils happen to be in different States the courts of either State may take the jurisdiction to divorce its citizen; but in the absence of notice to the defendant or his appearance, the sentence only relieves him of the marriage status, it cannot extend to the adjustment of property rights. It has, as a judicial judgment, no effect even upon the status of the party in the other State. Yet practically it terminates such party's marriage; because, when a married person has ceased to have a husband or wife, the law of such person's domicile does not recognize the continuance of the marriage relation. Happily, to prevent conflicts in jurisdiction, and to prevent parties from being married persons in one State and single in another, the Constitution of the United States has made this question a federal one, forbidding the States to deal with the subject otherwise than after these principles. So that real conflicts in divorce law have been rendered impossible. And that uniformity after which many good people are striving, not aware of its presence, has already been attained without depriving the States of their power to regulate the status of their domiciled citizens.

## CHAPTER VII.

## THE JURISDICTION UNDER PARTICULAR STATUTES.

§ 191. **Elsewhere.** — In the first chapter of this volume,<sup>1</sup> we saw something of this jurisdiction as compared with the international. In the fourth chapter, the effect of such statutory words as “resident,” “inhabitant,” and other similar ones, when employed to confer jurisdiction, instead of the international “domicil,” is pointed out.<sup>2</sup> In still other connections, will be found more or less of what might be appropriate in the present chapter. And further on, a summary of rules will be given for the domestic jurisdiction as derived from the unwritten and written laws.<sup>3</sup>

§ 192. **Continuity of Residence.** — Within a principle stated in the first volume,<sup>4</sup> where the statute requires a specified number of years’ “residence” by the plaintiff before bringing his suit, and whether this word is interpreted as synonymous with “domicil” or not,<sup>5</sup> the residence must be continuous; that is, not interrupted by a period of non-residence. But there may be a domicil or residence during a temporary absence,<sup>6</sup> therefore it is not necessary for the plaintiff to have slept every night, or to have been present every week, in the State during the statutory period, in order to give the court a jurisdiction. But —

§ 193. **Imperative.** — This sort of statute is interpreted as mandatory, so that there is no jurisdiction without the residence or domicil.<sup>7</sup> But not all the statutes are applicable to every sort of case. Thus, —

§ 194. **Delictum Elsewhere.** — A statute in the District of Columbia provides that no divorce shall be granted for any cause occurring out of the District unless the applicant shall have resided in it during the next two preceding years. When, therefore, a wife

<sup>1</sup> Ante, § 4-13.

<sup>2</sup> Ante, § 106-110.

<sup>3</sup> Post, c. 38.

<sup>4</sup> Vol. I. § 1771-1776.

<sup>5</sup> Ante, § 106-110.

<sup>6</sup> Ante, § 87, 88, 92.

<sup>7</sup> *Jacobsen v. Jacobsen*, 11 Or. 454.  
See *Spangler v. Spangler*, 19 Bradw. 28.

took up her abode in the District, leaving her husband behind, and there committed adultery, this statute was held not to bar him of his divorce suit, though he had never lived there.<sup>1</sup> Its terms render it inapplicable to such a case. Again, —

§ 195. **Delictum after Removal.** — A Connecticut statute requires a three years' residence by the plaintiff "unless the cause of divorce shall have arisen subsequently to the removal into this State."<sup>2</sup> And this has been interpreted to give the jurisdiction only where both parties have become domiciled in the State. So that where only the wife came, and the husband continued in habits of intemperance which by Connecticut law are ground of divorce, she was compelled to wait the three years for her remedy. "The Legislature," it was observed, "surely could never have intended that a woman living with her husband in another State might come into this State and, by showing that her husband has been habitually intemperate or committed adultery since she removed to this State, at once obtain a divorce. Such a construction would open a wide door for applicants from abroad."<sup>3</sup> This is a strict rendering,<sup>4</sup> and possibly there is room to distinguish between the sort of continuing offence in actual contemplation, and the very different one of adultery for the first time disclosed after the removal. The latter would not fall within the reason of the rule laid down.

§ 196. **Dispensing with Residence.** — There was a statute in one of our States permitting the court, in its discretion, to dispense with the ordinary residence required of plaintiffs. Among the rules to guide the discretion, said Staples, C. J., the jurisdiction has been taken on shorter domicile where "the causes of divorce occurred in this State, or were causes of divorce under the laws of the State where they occurred," if also both parties were domiciled in Rhode Island. In other circumstances, the jurisdiction on a less than the usual residence has been declined.<sup>5</sup>

§ 197. **"Lived Together" in State.** — Subject to exception, the Massachusetts statute denies jurisdiction unless the parties have "lived together as husband and wife" within the State. By inter-

<sup>1</sup> *Smith v. Smith*, 4 Mackey, 255. And see ante, § 139.

<sup>2</sup> Gen. Stats. of 1888, § 2806, re-enacting in substance an earlier provision.

<sup>3</sup> *Sawtell v. Sawtell*, 17 Conn. 284. See also *Brett v. Brett*, 5 Met. 233, a decision which has become unimportant in Massa-

chusetts, in consequence of Stat. 1843, c. 77.

<sup>4</sup> And see *Hopkins v. Hopkins*, 35 N. H. 474; *Goodwin v. Goodwin*, 45 Me. 377.

<sup>5</sup> *Williams v. Williams*, 3 R. I. 185. And see *Ditson v. Ditson*, 4 R. I. 87.

pretation a domicile is required, in distinction from a mere temporary abiding.<sup>1</sup> And a living apart, without cohabitation or other intercommunication, though in the State, will not suffice.<sup>2</sup> But where, immediately on the performance of a marriage ceremony in Massachusetts between parties there domiciled, the wife deserted the husband, it was held that this statute did not oust the jurisdiction of the court to declare a divorce.<sup>3</sup> If, while one of the parties is thus domiciled, the other has been in the State only transiently, and there has been here no cohabitation, there is no jurisdiction.<sup>4</sup> And the like construction was given in Maine to a similar statute.<sup>5</sup> In Massachusetts also, whenever this provision is relied on, and not the one authorizing jurisdiction on a certain number of years' residence by the complainant, one of the parties must have been living in the State when the *delictum* occurred. Within this rule, where a husband and wife were removing to Colorado, and on the way, at Philadelphia, he inflicted cruelty, and she returned to Massachusetts, he proceeding to his destination without her, the Massachusetts Court took jurisdiction of her cause.<sup>6</sup>

§ 198. **Going to another State for Divorce.**— By a Massachusetts statute, a divorce in "another State or country," in favor of one going there "to obtain a divorce for any cause occurring here, and whilst the parties resided here, or for any cause which would not authorize a divorce by the laws of this State," is of no validity.<sup>7</sup> This provision is in substance but an affirmation of the unwritten rule, though it may not have been always construed precisely so.<sup>8</sup> An attempt to hold void a divorce sentence in another State good on the principles explained in the foregoing chapters, because declared void by this statute, would be liable to be corrected by the Supreme Court of the United States, as in conflict

<sup>1</sup> *Ross v. Ross*, 103 Mass. 575; *Hanson v. Hanson*, 111 Mass. 158, 160.

<sup>2</sup> *Weston v. Weston*, 143 Mass. 274.

<sup>3</sup> *Eaton v. Eaton*, 122 Mass. 276. This case does not differ greatly from the one last cited. In that case, Holmes, J. said: "In *Eaton v. Eaton*, which perhaps can be upheld on its special facts, domicile without cohabitation was thought to satisfy the condition, and a divorce was granted. In that case, however, the court appears to have overlooked the earlier decision of *Schrow v. Schrow*, 103 Mass. 574, where the parties seem to have

been domiciled in Massachusetts, but it was held that their having lived in the State separately was not enough."

<sup>4</sup> *Schrow v. Schrow*, *supra*.

<sup>5</sup> *Calef v. Calef*, 54 Me. 365, 92 Am. D. 549.

<sup>6</sup> *Shaw v. Shaw*, 98 Mass. 158.

<sup>7</sup> Gen. Stats. c. 107, § 54; Pub. Stats. c. 146, § 41.

<sup>8</sup> *Chase v. Chase*, 6 Gray, 157, 160; *Smith v. Smith*, 13 Gray, 209; *Burlen v. Shannon*, 115 Mass. 438; *Sewall v. Sewall*, 122 Mass. 156, 23 Am. R. 299.



with the National Constitution and laws.<sup>1</sup> And a like provision in Maine is interpreted to have no application to parties acquiring in good faith a domicile in another State.<sup>2</sup>

§ 199. *Further as to which.* — In the absence, from the judicial mind, of the legal truth that this statute must be rendered in a way not conflicting with the Constitution of the United States, we find some mixture of inaccurate with accurate judicial utterances upon it. Thus, a divorce in another State made invalid by this statute is no answer to a fresh libel here. But in a case which so holds, Shaw, C. J., added: "The presumption is violent, if not conclusive, that the husband went into Indiana in order to obtain a divorce. Even if he had other objects in view, if this was one, — and his acting upon it is strong proof that it was, — it would be within the statute."<sup>3</sup> A consideration of views stated in preceding chapters will show this proposition to be slightly inaccurate. For example, if the party changed his domicile to the other State, the fact that his motive was divorce<sup>4</sup> would not render the decree internationally void, and a holding that it was would be corrected by the Supreme Court of the United States.<sup>5</sup> A recital of citizenship in the foreign decree will not estop inquiry into the real fact.<sup>6</sup> And if the applicant, before he went to the other State, had sought in Massachusetts a divorce and failed, this will be a circumstance in evidence tending to show the removal not *bona fide*, but made to obtain the divorce.<sup>7</sup>

### § 200. *The Doctrine of this Chapter restated.*

We have statutes, varying in our several States, in limitation of the international jurisdiction. The common and nearly universal ones require a specified residence by the plaintiff in the State wherein he applies for divorce. We need not repeat their interpretations. They are constitutionally valid; because the legislature of a State, being under no constitutional duty to grant divorce at all, may establish limits beyond which the court must refuse it. But the legislature of one State cannot constitutionally command the courts of the State to decline recognition of the divorce sentences of other States, or pronounce them void.

<sup>1</sup> Ante, § 180-185; Gregory v. Gregory, 76 Me. 535, 539.

<sup>2</sup> Gregory v. Gregory, supra.

<sup>3</sup> Smith v. Smith, 13 Gray, 209, 210.

<sup>4</sup> Ante, § 101-105.

<sup>5</sup> Ante, § 198.

<sup>6</sup> Ante, § 184. And see, to the like effect, Hoffman v. Hoffman, 46 N. Y. 30,

<sup>7</sup> Am. R. 299.

<sup>7</sup> Shannon v. Shannon, 4 Allen, 134.

## BOOK IX.

## THE GENERAL DEFENCES.

## CHAPTER VIII.

## CONNIVANCE.

- § 201, 202. Introduction.  
 203-220. The Law.  
 221, 222. Law and Evidence distinguished.  
 223-247. The Evidence.  
 248. Doctrine of Chapter restated.

§ 201. **The Defences of the Present Book**—are the general ones, common to all divorce suits. In places further on, other matter more or less in the nature of defence will appear. Likewise the pleading and practice are explained in subsequent connections, but the evidence pertaining to these general defences is for the present series of chapters.

§ 202. **How Chapter divided.**—We shall consider, I. The Law of the Subject; II. The Distinction between the Law and the Evidence; III. The Evidence.

I. *The Law of the Subject.*

§ 203. **Defined.**—Connivance in divorce law is a married party's corrupt consenting to evil conduct in the other whereof afterward he complains. And—

§ 204. **Bars Divorce and why.**—It excludes the right of divorce on the double ground, that in a court of justice one will not be heard to complain of an act tainted by his own wrong;<sup>1</sup> and that,

<sup>1</sup> Bishop Non-Con. Law, § 54-64.

in the words of Lord Stowell, by reason of the consent “no injury has been done and therefore there is nothing to redress.”<sup>1</sup>

§ 205. **In what Cases — (Adultery).** — Though, in common with the other defences to be treated of in this series of chapters, this one is available in all divorce suits, practically it oftenest arises in adultery. So that almost with special reference to this sort of case the present elucidations will be shaped. They will embrace the three elements, corruption in the consenting, the husband watching the wife, and connivance at one act as barring the complaint for another.

§ 206. **First. Corruption in the Consenting: —**

**Meaning explained.** — Undoubtedly any consenting in fact, by one of the married parties to the other’s committing adultery, would be deemed, in the language of our definition, “corrupt.” But there is an indirect connivance, inferable from acts. And where the intent does not otherwise appear, those acts, to render this defence adequate, must, it seems, proceed from an evil motive; the common one being the intent that adultery shall follow. For example, as the married parties have arrived at years of understanding, and each is properly responsible for his own conduct, no neglect by the one of the duties of watchfulness and care over the other will in reason bar divorce, unless actual matrimonial delinquency was either desired or passively consented to. And such is believed to be, on the whole, the doctrine also of our books; though not all the authorities are precisely so, or apparently reconcilable with any one form of the doctrine. Thus, —

§ 207. **Errors of Judgment** — in one, coming short of a willingness to have the delinquency committed by the other, are not connivance, however fatal in their consequences. “Different men,” said Lord Stowell, “have different degrees of judgment, and judge differently; nor are we to judge by the event. A court of justice must look *quo animo* the step is taken.”<sup>2</sup> Still, in matter of

<sup>1</sup> Forster v. Forster, 1 Hag. Con. 144, 4 Eng. Ec. 358, 360; Rogers v. Rogers, 3 Hag. Ec. 57, 5 Eng. Ec. 13, 14; Anichini v. Anichini, 2 Curt. Ec. 210, 7 Eng. Ec. 85, 86; Pierce v. Pierce, 3 Pick. 299, 15 Am. D. 210; Reeves v. Reeves, 2 Phillim. 125, 1 Eng. Ec. 208; Moorsom v. Moorsom, 3 Hag. Ec. 87, 5 Eng. Ec. 28; Harris v. Harris, 2 Hag. Ec. 376, 414, 4 Eng. Ec. 160, 178; Clowes v. Clowes, 9 Jur. 356;

Barker v. Barker, 2 Add. Ec. 285, 2 Eng. Ec. 307; Phillips v. Phillips, 1 Rob. Ec. 144; Myers v. Myers, 41 Barb. 114; Danforth v. Danforth, 105 Ill. 603; Bourgeois v. Chauvin, 39 La. An. 216; Hardy v. Smith, 136 Mass. 328. And see Cartwright v. Bate, 1 Allen, 514, 79 Am. D. 759.

<sup>2</sup> Hoar v. Hoar, 3 Hag. Ec. 137, 5 Eng. Ec. 51, 53; Moorsom v. Moorsom, 3 Hag.

evidence, the rule will hold good here as elsewhere,<sup>1</sup> that *prima facie* what was probable will be presumed to have been intended.<sup>2</sup> Moreover, —

§ 208. **Active or Passive.** — The connivance may be a passive permitting of the adultery or other misconduct, as well as an active procuring of its commission. If the mind consents, that is connivance.<sup>3</sup> And there is no connivance without such consent, either active or passive.<sup>4</sup> Moreover, —

§ 209. **Act or Omission.** — In conformity to the analogies of the law in all its other departments,<sup>5</sup> it cannot in reason be connivance where no act or word, or omission of duty, has blended with the mere passive willingness to have the wrong committed. The law does not take cognizance of thought which has neither given forth sound nor in any degree influenced the conduct.

§ 210. **Extreme Negligence** — Dr. Lushington once suggested the query whether something short of this concurrence of the will may not bar the divorce suit for adultery. “The court,” he said, “certainly does not recollect any case of the kind; but it can conceive that a case might arise of such wilful neglect, or rather exposure, as might, without proving actual connivance, possibly bar the husband of all remedy by a divorce. A husband might introduce his wife to society so abandoned, and expose her to risks so great, as to render a deviation from the paths of chastity the most probable, if not the necessary, consequence. Under such circumstances, perhaps the court would not wait for proof of actual connivance on the part of the husband, but would hold

Ec. 87, 5 Eng. Ec. 28; *Turton v. Turton*, 3 Hag. Ec. 338, 5 Eng. Ec. 130, 136; *Ross v. Ross*, Law Rep. 1 P. & M. 734; *Allen v. Allen*, 30 Law J. N. S. Mat. 2; *Cochran v. Cochran*, 35 Iowa. 477. And see the luminous judgment of Sir Herbert Jenner Fust, in *Phillips v. Phillips*, 10 Jur. 829, where this whole subject of connivance is discussed, and the authorities are cited and reviewed. The principle deduced by the court, as applicable to the case then under consideration, is “that where there is no corrupt intention proved on the part of the husband, he is not debarred from the remedy.” See also s. c. decided in the court below, by Dr. Lushington, 1 Rob. Ec. 144.

<sup>1</sup> Vol. I. § 1640–1647, 1741.

<sup>2</sup> *Gilpin v. Gilpin*, 3 Hag. Ec. 150, 153, 5 Eng. Ec. 58; *Herrick v. Herrick*, 31 Mich. 298. And see *Mackenzie v. His Wife*, Mor. Dict. 333.

<sup>3</sup> *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 5 Eng. Ec. 28; *Rogers v. Rogers*, 3 Hag. Ec. 57, 59, 5 Eng. Ec. 13, 15; *Walker v. Walker*, cited 3 Hag. Ec. 59, 5 Eng. Ec. 15; *Rix v. Rix*, 3 Hag. Ec. 74, 5 Eng. Ec. 21; *Boulting v. Boulting*, 3 Swab. & T. 329; 2 Greenl. Ev. § 51.

<sup>4</sup> *Marris v. Marris*, 2 Swab. & T. 530; *Glennie v. Glennie*, 8 Jur. N. S. 1158, 32 Law J. N. S. Mat. 17; *Gipps v. Gipps*, 11 H. L. Cas. 1.

<sup>5</sup> 1 Bishop Crim. Law, § 204, 430 et seq.

him to the consequences of his own conduct, when the adulterous connection arose from the society and temptations to which he had introduced his wife.”<sup>1</sup> Assuming the correctness of the doctrine thus suggested, it appears in reason to come from the principle that one is presumed to intend the natural and probable consequences of his conduct.<sup>2</sup> Should a husband ignorantly place his wife in temptation, it would be contrary alike to the spirit of the authorities and to natural justice to hold that the mistake has barred him of his remedy on her voluntarily yielding.<sup>3</sup> For “a chaste husband ought, if he desires it, to have a wife who will remain chaste when exposed to the temptations which are incident to the ordinary conditions of modern social life.”<sup>4</sup> And such evidently was likewise the later opinion of the same learned judge himself, as to what the law is, perhaps not as to what it ought to be.<sup>5</sup> So that, —

§ 211. **Conduct leading to Adultery — (Cruelty — Desertion).** — The distinction should be maintained between those cases wherein the husband’s connivance is inferable from his knowingly permitting what will probably lead to the wife’s adultery, and those which, short of this, disclose in him ill conduct more or less calculated to bring about this dereliction. Speaking to a case of the latter sort, Dr. Lushington, thirteen years after he uttered the words quoted in the last section, said: “If adultery is charged against a wife, if counter-adultery cannot be proved, nothing can

<sup>1</sup> *Harris v. Harris*, 2 Hag. Ec. 376, 415, 4 Eng. Ec. 160, 178. See *Mackenzie v. His Wife*, Mor. Dict. 333; post, § 296. And see *Barber v. Barber*, 14 Law Reporter, 375, a Connecticut case, in which similar language is employed by Church, C. J. In *Crim. Con.* — In actions for criminal conversation, the doctrine of the common law is that the husband is barred by his consent to his wife’s adultery, or to her leading the life of a prostitute; but his mere negligence goes only in reduction of damages. *Duberley v. Gunning*, 4 T. R. 651, 657; *Cook v. Wood*, 30 Ga. 891, 76 Am. D. 677; *Sherwood v. Titman*, 55 Pa. 77; *Winter v. Henn*, 4 Car. & P. 494; *Calcraft v. Hasbrough*, 4 Car. & P. 499; *Bunnell v. Greathead*, 49 Barb. 106. See Vol. I. § 1367, 1370-1372; *Reeve Dom. Rel.* 64. And see *Richardson v. Fouts*, 11 Ind. 466; *Zerfing v. Mourer*, 2 Greene,

*Iowa*, 520; *Travis v. Barger*, 24 Barb. 614; *Graham v. Smith*, Edm. Sel. Cas. 267; *Parker v. Elliott*, 6 Munf. 587.

<sup>2</sup> Ante, § 207. “In all this I do not say that the husband intended the ruin of his wife, and was looking for a divorce as the consequence; but if the legal presumption be applied that every man is presumed to intend the legitimate consequence of his deliberate acts, such a conjecture is not unreasonable.” The plaintiff was held to be barred of his remedy. *Barber v. Barber*, supra.

<sup>3</sup> See *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 5 Eng. Ec. 28; *Hoar v. Hoar*, 3 Hag. Ec. 137, 5 Eng. Ec. 51; *Burgess v. Burgess*, 2 Hag. Con. 223, 4 Eng. Ec. 527.

<sup>4</sup> *Field, J.* in *Robbins v. Robbins*, 140 Mass. 528, 531, 54 Am. R. 488.

<sup>5</sup> *Phillips v. Phillips*, 1 Rob. Ec. 144.

bar a sentence for separation but connivance on the part of the husband. Cruelty will not be a bar, neither will malicious desertion; although such conduct will have a tendency to cause the wife to commit adultery, it is clearly established that it is no defence to the husband's suit. Although I have some doubt as to the propriety of the doctrine on this point, I have felt myself compelled to act on it; indeed I did act on it in a recent case."<sup>1</sup> Therefore he held, in a husband's suit for adultery, that a defensive charge of cruelty, not admissible in England on general principles,<sup>2</sup> was not rendered so by the averment of its having been inflicted to get rid of the wife by driving her to the commission of adultery. But he added: "There may by possibility be cases where cruelty on the part of the husband may directly lead up to the wife's adultery; I say nothing upon such a case."<sup>3</sup> In principle, could the cruelty be shown to have been resorted to for the specific purpose of driving the wife into adultery, it would be sufficient. His will would have concurred in the adultery; and this we have seen to be connivance under every view of the law. Later, in England, —

§ 212. **Further of "Conducing to Adultery."**—The English Divorce Act, in some provisions relating to the suit for dissolution, not extending to the judicial separation,<sup>4</sup> appears to have given greater effect to misconduct which "conduced to the adultery" than Dr. Lushington did, as stated in the last section. Under these provisions we have such rulings as the following: On a husband's petition it appeared that he had seduced the wife before marriage, and soon after the marriage the parties separated. He allowed her a small sum for her support. Some years later he discovered that she had committed adultery, and brought his divorce suit; but the court "having regard to the petitioner's conduct in leaving his wife without a husband's protection, and being of opinion that that conduct conduced to her adultery," denied his prayer.<sup>5</sup> In another case, it was admitted that the complaining husband left his wife on her contracting habits of intoxication, broke up his home, and sold his furniture, intending to get rid

<sup>1</sup> Referring to *Morgan v. Morgan*, 2 Curt. Ec. 679, 686, 7 Eng. Ec. 258. And see post, § 232-234.

<sup>2</sup> Post, § 351.

<sup>3</sup> *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377, 381. And see the opinion

of the same judge in *Phillips v. Phillips*, 1 Rob. Ec. 144; s. c. in the Arches Court, 10 Jur. 829.

<sup>4</sup> 20 & 21 Vict. c. 85, § 29-31; Vol. I. § 153, note; post, § 357-362.

<sup>5</sup> *Hawkins v. Hawkins*, 10 P. D. 177.

of her. He made her no allowance, and only met her by accident eight years after the separation. Five years still later, he applied for a divorce for her adultery which he proved, but he was refused.<sup>1</sup>

§ 213. Secondly. *The Husband watching the Wife* : —

**Doctrine defined.** — A husband who suspects his wife of adultery may take means to procure proof. But he must not lead her into a fresh wrong because he fears she is guilty of an old one. Thus, —

§ 214. **More Particularly.** — He may watch her, even leave open the opportunities which he finds ; but he must not make new ones, or lay temptations in her way.<sup>2</sup> “ True it is,” said Lord Stowell, “ a husband is not barred by a mere permission of opportunity for adultery ; nor is it every degree of inattention on his part which will deprive him of relief ; but it is one thing to permit, and another to invite. He is perfectly at liberty to let the licentiousness of the wife take its full scope ; but that he is to contrive the meeting, that he is to invite the adulterer, then to decamp and give him the opportunity, I do think amounts to legal prostitution.”<sup>3</sup> To illustrate, —

§ 215. **Instances.** — A husband suspecting his wife of offending with a lodger, pretended to go away, thereby affording her an opportunity which otherwise she would not have embraced. And this was held not to be connivance barring his suit for adultery which she thereupon committed.<sup>4</sup> But where a husband, willing that his wife should fall into this dereliction if he could thereby obtain a divorce, frequently, having some one to watch her, left her alone with the suspected paramour, suffered them to go alone on excursions, and permitted him undue familiarity with her, he was held to have connived at the adultery the proof whereof he thus obtained.<sup>5</sup> So —

§ 216. **Agent arranging Temptations.** — If the husband employs,

<sup>1</sup> Heyes v. Heyes, 13 P. D. 11.

<sup>2</sup> See, for illustrative matter, 1 Bishop Crim. Law, § 262, 263.

<sup>3</sup> Timmings v. Timmings, 3 Hag. Ec. 76, 5 Eng. Ec. 22, 25 ; Pierce v. Pierce, 3 Pick. 299, 15 Am. D. 210, Reeves v. Reeves, 2 Phillim. 125, 1 Eng. Ec. 208 ; Clowes v. Clowes, 9 Jur. 356 ; Bray v. Bray, 2 Halst. Ch. 628. See Cochran v. Cochran, 35 Iowa. 477 ; Cairns v. Cairns, 109 Mass. 408. Dr. Lushington said that this expression of Lord Stowell's must be

understood to mean only that a husband, suspecting his wife of adultery, is at liberty to remain quiet, and to watch her, for the purpose of detecting her ; but if he is once in possession of a fact of adultery, and still continues his cohabitation, it proves, as Lord Stowell had also observed, connivance, collusion, and facility. Phillips v. Phillips, 1 Rob. Ec. 144, 160.

<sup>4</sup> Robbins v. Robbins, 140 Mass. 528, 54 Am. R. 488.

<sup>5</sup> Morrison v. Morrison, 136 Mass. 310.

to watch the wife, an agent who with his knowledge lays temptations for her, he is in the same position as though this was done by him in person. And it appears to be the English doctrine that the effect will not be different though the agent proceeded self-moved, without authority in fact from the principal, in analogy to the rule in contracts<sup>1</sup> that one who takes an advantage from an agent's unauthorized fraud is answerable for the fraud.<sup>2</sup> Now, in the law of contracts, this principle extends even to a volunteer, who practises a fraud in a transaction wherefrom another accepts a benefit.<sup>3</sup> Should we apply the principle thus extended to the connivance of the divorce law, the result would be that whenever any one volunteers to tempt a married woman to adultery, and she yields, the husband, if he takes advantage of the adultery by asking a divorce for it, is responsible for the temptation and barred of his remedy. A doctrine leading to such absurdity cannot be sound. In matter of evidence, the presumption would be violent that the agent's wickedness proceeded from the husband's promptings, but if clearly the fact appeared otherwise, the element of corruption in the assumed connivance<sup>4</sup> would be wanting, and the husband would be entitled to his divorce for the adultery thus established.

§ 217. Thirdly. *Connivance at one Act as barring the Complaint for another* : —

**Doctrine defined.** — A husband who connives at one act of adultery by his wife cannot complain of any subsequent act, whether with the same or another *particeps criminis* ;<sup>5</sup> but a prior adultery, not being within the same reason, is not necessarily within the same rule.<sup>6</sup> To explain, —

§ 218. **Subsequent Adultery.** — In natural reason, therefore in legal doctrine, if a husband encourages or permits his wife to commit adultery to-day, she may assume his consent to do the same to-morrow. And the consent cannot in general be construed as limited to the individual participant in whose favor the permission of to-day was given. But it was laid down in the

And compare with *P. v. Chapman*, 62 Mich. 280, 4 Am. St. 857.

<sup>1</sup> Bishop Con. § 1113, 1114.

<sup>2</sup> *Gower v. Gower*, Law Rep. 2 P. & M. 428; *Picken v. Picken*, 34 Law J. N. S. Mat. 22. But see *Sugg v. Sugg*, 31 Law J. N. S. Mat. 41; as to which, see *Gower v. Gower*, *supra*.

<sup>3</sup> Bishop Con. § 1223-1225.

<sup>4</sup> Ante, § 203, 206.

<sup>5</sup> *Gipps v. Gipps*, 3 Swab. & T. 116; *Hedden v. Hedden*, 6 C. E. Green, 61.

<sup>6</sup> *Woodward v. Woodward*, 14 Stew. Ch. 224; *Morrison v. Morrison*, 142 Mass. 361, 56 Am. R. 688.



English ecclesiastical courts that a defending wife, who sets up her husband's connivance at a prior adultery with a different person, must prove the former adultery; since connivance in law does not attach on the one side unless the legal guilt of adultery is incurred on the other, though *in foro conscientiae* it may be otherwise.<sup>1</sup> Now, as connivance is in essence one's mental concurrence with the other's outward act, the New Jersey Court reasoned more justly that if a husband merely endeavors unsuccessfully to procure the commission of adultery by his wife his right to a divorce for her subsequent adultery is barred; for thereby he as effectually consents to her subsequent evil doing as though his original attempt at her seduction had been successful.<sup>2</sup> Hereupon, —

§ 219. **Limit of Doctrine.**—It cannot be that, contrary to the general tendency of the law which favors repentance and reformation, connivance at adultery is an exceptional wrong whereof one is forbidden to repent, and from which he may not recede. So that within the principle of repentance and retracting the implied consent, there may in reason be circumstances wherein, contrary to the general rule, a husband may have a divorce for his wife's adultery transpiring after he has connived at a particular like act. But the limits of this doctrine are uncertain. Sir William Wynne, in 1795, held a husband not barred of his suit for his wife's gross adultery committed after a five years' separation, and resulting in children who were baptized in his name, though before the separation he had connived at her adultery with men other than the one now in question.<sup>3</sup> But in the Common-Law Court, before which the same husband sued the adulterer for the criminal conversation, Lord Kenyon ruled that "his having suffered such connections with other men was equally a bar to the action as if he had permitted the present defendant to be connected with her."<sup>4</sup> And later, in the Ecclesiastical Court, Dr. Lushington refused to follow Sir William Wynne. "I never can," he said, "think that a man who had been so forgetful of his own duties, moral and religious, toward his wife, and of all feelings of honor as a gentleman, as to connive at his own disgrace by being

<sup>1</sup> *Stone v. Stone*, 3 Notes Cas. 278, 306, 307, 1 Rob. Ec. 99. There must be consent with knowledge of the adultery. *Phillips v. Phillips*, 1 Rob. Ec. 144.

<sup>2</sup> *Hedden v. Hedden*, 6 C. E. Green, 61.

<sup>3</sup> *Hodges v. Hodges*, 3 Hag. Ec. 118,

<sup>5</sup> *Eng. Ec. 42.*

<sup>4</sup> *Hodges v. Windham, Peake*, 39.

a party to her adultery with one man, can come to a court of justice with clean hands, and seek a separation for the subsequent conduct of his wife, to whose guilt he had been, as it were, foster-father.”<sup>1</sup> Much earlier, Lord Stowell dismissed a husband’s suit to which the wife made no defence; because, though the adultery alleged was clearly proved, he had connived at another adulterous act, nearly contemporaneously committed, with another person. “The Ecclesiastical Court,” said this eminent judge, “requires two things,—that a man shall come with pure hands himself, and shall have exacted a due purity on the part of his wife; and if he has relaxed with one man, he has no right to complain of another.”<sup>2</sup> But these cases do not contain the element of the husband’s repentance and remonstrance with the wife, or of other changed circumstances.

§ 220. **Prior Adultery.**—If two acts of adultery are proved, and it is also shown that the husband connived at the later one, such connivance will in reason be a valid fact in evidence tending to show his connivance at the earlier. But if in truth he did not thus participate in the earlier, his later and independent wrong will not bar him of his divorce for the wife’s earlier fault,—the transactions being independent and disconnected, the one which is without taint in fact is not through any theory of law tainted by the other.<sup>3</sup>

## II. *The Distinction between the Law and the Evidence.*

§ 221. **Not Difficult.**—The courts wherein this issue is tried by a jury have experienced no special difficulties in separating the law from the evidence. Hence no judicial elucidations of this subject have found their way into the books. But,—

§ 222. **In Principle,**—if the pleadings are of a sort to open the entire case to the jury, the judge should direct them to consider whether, in real truth, the party accused of connivance either desired the commission of the offence or was indifferent whether it was committed or not; then whether, being in the one state

<sup>1</sup> *Stone v. Stone*, 3 Notes Cas. 278, 282, 1 Rob. Ec. 99. See remark of Sir John Nicholl, in *Rogers v. Rogers*, 3 Hag. Ec. 57, 5 Eng. Ec. 13, 20.

<sup>2</sup> *Lovering v. Lovering*, 3 Hag. Ec. 85, 5 Eng. Ec. 27, 28.

<sup>3</sup> *Woodward v. Woodward*, 14 Stew. Ch. 224; *Morrison v. Morrison*, 142 Mass. 361, 56 Am. R. 688. And see *Bleck v. Bleck*, 27 Hun, 296.

of mind or in the other, he did any act, spake any word, or abstained from the performance of any moral or social duty, to promote its commission, or, in short, in any way by will or conduct contributed to the result. Such general principles of law should also be mentioned, if the facts indicate, as that one shall be presumed, in the absence of controlling proof, to intend whatever result his own conduct is calculated to produce; and the like. What further, therefore, is to be said in this chapter will find place under the general sub-title of —

### III. *The Evidence.*

§ 223. **Strict in Proportion to Gravity — (Unlike Condonation).** — Where, in any issue, presumptions of innocence are to be overcome, the evidence must be more direct and conclusive than where they are not. Connivance is a corrupt and specially odious act, in which respect it differs from condonation, often commendable, yet the consequence whereof is the same. Therefore it can be established only by more weighty evidence.<sup>1</sup> And —

§ 224. **Burden and Conclusiveness of Proof.** — The burden of proof is on the party setting up the connivance. And the evidence must be strongly inculpatory,<sup>2</sup> admitting of no dispute.<sup>3</sup> In the language of Sir John Nicholl: "It cannot readily be presumed that any husband would act so contrary to the general feelings of mankind as to be a consentient party to his own dishonor."<sup>4</sup> Yet —

§ 225. **Time and Place.** — In similitude to the rule that adultery need not be proved in time and place,<sup>5</sup> a specific act of conniving at a specific act of adultery need not be shown. General connivance will suffice.<sup>6</sup> Indeed, this flows necessarily from the doctrine that connivance at one act with one individual presumes connivance at subsequent acts with all persons.

§ 226. **Evidence Circumstantial.** — Connivance, like many other things in issue, can seldom be shown by direct proofs. This is

<sup>1</sup> *Turton v. Turton*, 3 Hag. Ec. 338, 350, 5 Eng. Ec. 130, 136.

<sup>2</sup> *Croft v. Croft*, 3 Hag. Ec. 310, 5 Eng. Ec. 120, 121; *Phillips v. Phillips*, 1 Rob. Ec. 144.

<sup>3</sup> *Turton v. Turton*, *supra*; *Rix v. Rix*, 3 Hag. Ec. 74, 5 Eng. Ec. 21; *Phillips v. Phillips*, 1 Rob. Ec. 144, 156.

<sup>4</sup> *Rogers v. Rogers*, 3 Hag. Ec. 57, 5 Eng. Ec. 13, 16.

<sup>5</sup> *Caton v. Caton*, 13 Jur. 431, 432.

<sup>6</sup> *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 5 Eng. Ec. 28. But see *Phillips v. Phillips*, 1 Rob. Ec. 144, 162.

specially so when it is of the mere consenting kind. Therefore ordinarily the evidence consists of a variety of attendant facts, perhaps trifling in themselves, yet convincing in combination.<sup>1</sup> And it must go the full length of establishing the guilty intent to connive, which is the essence of the offence, not leaving it to conjecture.<sup>2</sup>

§ 227. **Lushington's Formula.** — Dr. Lushington in one case of circumstantial evidence, inquiring whether or not a husband connived at his wife's adultery, considered, (1) What acts were done by the wife; (2) What came to the knowledge of the husband; (3) What might reasonably have come to his knowledge, — or, in other words, supposing occasion for inquiry existed, what might with ease have been discovered; (4) What the husband did do, and what he did not do.<sup>3</sup> This is a good formula for evidence which it will fit, not for every case. So the following things may severally, or not, call for special consideration, —

§ 228. **Husband's Duty to Wife.** — The law requires watchfulness by the husband over the wife's morals, and protection from associations hazardous to her purity, or otherwise preparing the way for the approaches of the seducer.<sup>4</sup> Especially he should be personally guilty of no indecencies toward her tending to corrupt her morals.<sup>5</sup> And what he knew of her antenuptial conduct may not unfrequently be an important element in this aspect of the case.<sup>6</sup> Still, in point of law, —

<sup>1</sup> *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 5 Eng. Ec. 28; *Rogers v. Rogers*, 3 Hag. Ec. 57, 5 Eng. Ec. 13, 15.

<sup>2</sup> *Phillips v. Phillips*, 1 Rob. Ec. 144, 157, 158, 10 Jur. 829, 832.

<sup>3</sup> *Phillips v. Phillips*, 1 Rob. Ec. 144; s. c. in *Arches Court*, 10 Jur. 829, 4 Notes Cas. 523; affirmed by Jud. Com. of Privy Council, June 29, 1847.

<sup>4</sup> *Harris v. Harris*, 2 Hag. Ec. 376, 4 Eng. Ec. 160, 177; *Hamerton v. Hamerton*, 2 Hag. Ec. 8, 4 Eng. Ec. 13, 15. In *Crewe v. Crewe*, 3 Hag. Ec. 123, 133, 5 Eng. Ec. 45, 50, Lord Stowell said: "The general mode in which these parties lived together is extraordinary, and not unimportant. There was no formal separation, yet as much estrangement as can well consist with the marriage state. She is allowed to go to Bath, to Brighton, and to other public places, without the hus-

band being there for more than a night or two. The court cannot compel the husband, even if he has no office nor profession that prevents him, to be constantly with his wife; but every man must observe that this husband did not give his wife the benefit of his care. I do not say that the husband is to dog his wife at every step with sullen and gloomy suspicion; but the protection and comfort of his society are to be afforded to a person so closely connected with him, and in whose conduct his happiness, as well as her own, is involved." And see *Poynter Mar. & Div* 228, 229.

<sup>5</sup> *Mackenzie v. His Wife*, *Mor. Dict.* 333.

<sup>6</sup> *Post*, § 237; *Levy v. Levy*, 16 Bradw. 358; *Marshall v. Marshall*, 8 Scotch Sess. Cas. 4th ser. 702.

§ 229. **Indifference** — by a husband to his wife's selection of associates, to her morals, and to her conduct in other respects, or even his introducing the paramour to her, is not of itself connivance, however effective it may be in evidence.<sup>1</sup> On the other hand,—

§ 230. **Wife as to Husband**—(**Differing Rule of Connivance**).—The wife is not under the same duty to watch over the husband's morals and associations. She may bar her right by connivance, and it may be proved against her by circumstantial evidence as well as by direct; yet it is not always inferred from facts which would be ample were the parties reversed.<sup>2</sup> Thus,—

§ 231. **Instances.**—Where a wife knew that her husband had committed adultery with her sister, yet for reasons quite special she permitted this sister to accompany herself and him to India, and to live in the same house with them, the court in contemplation of all the facts granted her a divorce for his subsequent adultery with this sister. Though the wife's conduct was imprudent, it was deemed not necessarily to proceed from an evil intent.<sup>3</sup> And Dr. Lushington once refused to infer connivance against the wife, though for the purposes of the decision he assumed that she had voluntarily cohabited with her husband in harmony a year, and afterward had forbore to bring her suit for eight years, during all which time she had knowledge of the adultery,<sup>4</sup>—conduct abundantly sufficient for a bar were the parties reversed.<sup>5</sup>

§ 232. **Minor Inattentions**,—even the husband's, to the comforts of the wife, and his coolness toward her, seem not to be so much as admissible in evidence to the charge of his having connived at her adultery.<sup>6</sup> In reason, this is so where they stand alone; but they might be so connected with other facts as to render them obviously competent.

<sup>1</sup> *Rix v. Rix*, 3 Hag. Ec. 74, 5 Eng. Ec. 21; *Gilpin v. Gilpin*, 3 Hag. Ec. 150, 5 Eng. Ec. 58; *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 5 Eng. Ec. 28; *Stone v. Stone*, 3 Notes Cas. 278, 308, 309, 1 Rob. Ec. 99, 101; *Michelson v. Michelson*, 3 Hag. Ec. 147, 5 Eng. Ec. 56; *Crewe v. Crewe*, 3 Hag. Ec. 123, 5 Eng. Ec. 45; *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377; *Graves v. Graves*, 3 Curt. Ec. 235, 7 Eng. Ec. 425; and *Hoar v. Hoar*, 3 Hag. Ec. 137, 5 Eng. Ec. 51.

<sup>2</sup> *Poynter Mar. & Div.* 231, and *Rud-*

*ing v. Ruding*, Ib. note; *Angle v. Angle*, 12 Jur. 525.

<sup>3</sup> *Turton v. Turton*, 3 Hag. Ec. 338, 5 Eng. Ec. 130. The court in this case intimated that even if connivance had been proved, the wife might not be barred thereby, because 'the adultery was incestuous.

<sup>4</sup> *Angle v. Angle*, 12 Jur. 525. And see *Cochran v. Cochran*, 35 Iowa, 477.

<sup>5</sup> See post, § 238, 239.

<sup>6</sup> *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 5 Eng. Ec. 28.

§ 233. **Coarse Language and Cruelty** — by the husband to the wife may be proper items to be shown among other evidence of his connivance at her adultery, but they are inadequate alone.<sup>1</sup> So that when a wife averred in her answer to the husband's suit for her adultery, that if committed it was brought about by him and the *particeps criminis* mutually for obtaining a divorce, she was not permitted, in support of this allegation, to introduce testimony of his having for a considerable time treated her unkindly, and inflicted cruelty; either, first, as proving the connivance; or, secondly, as repelling the presumption against it which arises from the marriage relation.<sup>2</sup> Now, —

§ 234. **Further as to which.** — Within explanations in a preceding sub-title,<sup>3</sup> this sort of conduct may be quite pertinent to the charge of connivance when combined with other proofs. Indeed, always in circumstantial evidence the admissibility of a fact not directly leading to the result in litigation will depend upon the facts which go with it. While, for example, a husband may beat and abuse his wife without conniving at her adultery, and while this is so obviously true that such mere ill-treatment will not be admissible to the issue of connivance, yet if there are independent circumstances directly pointing to this conclusion, it may be more easily drawn should it further appear that he has lost his affection for her, therefore is probably desirous of getting rid of her. Thus we shall see, in a subsequent chapter, that evidence of cruelty is admissible in proof of adultery; because a husband whose love for his wife has departed is likely to seek unlawful pleasures.

§ 235. **Knowledge** — in the husband's mind may be, and commonly but not necessarily is, an important element in the question whether or not he connived at the wife's adultery.<sup>4</sup> In one case, Dr. Lushington went so far as on a review of the authorities to say: "There must be knowledge, or presumed knowledge, of the adultery, or improper familiarities leading thereto; not finding any evidence of this description, I pronounce for the separation."<sup>5</sup> Thence it follows, that, —

<sup>1</sup> Stone v. Stone, 1 Rob. Ec. 99, 101, 3 Notes Cas. 278, 308, 309.

<sup>2</sup> Austin v. Austin, 10 Conn. 221.

<sup>3</sup> Ante, § 211, 212.

<sup>4</sup> Ante, § 227; Hoar v. Hoar, 3 Hag. Ec. 137, 140, 5 Eng. Ec. 51, 53; Rogers v. Rogers, 3 Hag. Ec. 57, 5 Eng. Ec. 13,

18, 19, 20; Timmings v. Timmings, 3 Hag. Ec. 76, 5 Eng. Ec. 22; Lovering v. Lovering, 3 Hag. Ec. 85, 5 Eng. Ec. 27; Crewe v. Crewe, 3 Hag. Ec. 123, 5 Eng. Ec. 45.

<sup>5</sup> Phillips v. Phillips, 1 Rob. Ec. 144, 164.

§ 236. **Parties in Separation.** — If the husband and wife were living apart at the time of the adultery committed, and no improper familiarities are shown to have taken place during their cohabitation, connivance will not be presumed without the clearest evidence of intention and consent.<sup>1</sup> On the other hand, —

§ 237. **In Cohabitation.** — While the cohabitation is not suspended, if the husband receives a caution concerning the conduct of his wife,<sup>2</sup> or if he sees what a reasonable man could not see without alarm,<sup>3</sup> or if he knows she has been guilty of antenuptial incontinence,<sup>4</sup> or if he seduced her himself before marriage,<sup>5</sup> whereby he is put on his guard against her weakness, — he is called upon to exercise a special vigilance and care over her; and if he sees what a reasonable man could not permit, and makes no effort to avert the danger, he will be presumed to see and mean the consequences. Yet this rule should be applied with due allowance for defective perception, dulness of capacity, overweening confidence, and the like.<sup>6</sup>

§ 238. **Husband's too ready Condonation.** — Forgiveness, even of adultery, may be commendable; nor is it a license to commit future adulteries.<sup>7</sup> But there is an alacrity to condone, commonly termed a too great facility of condonation, which shows an absence of all sense of injury, — leading to the just inference that subsequent misconduct was connived at or licensed.<sup>8</sup> In considering this evidence, the facts special to the case must be taken into the account. Where the wife committed adultery on the first of three successive nights, and the husband knowing

<sup>1</sup> *Rogers v. Rogers*, 3 Hag. Ec. 57, 72, 5 Eng. Ec. 13, 20.

<sup>2</sup> *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377.

<sup>3</sup> *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 106, 5 Eng. Ec. 28, 37.

<sup>4</sup> Ante, § 228; *Best v. Best*, 1 Add. Ec. 411; s. c. in Arches Court, cited Poynter Mar. & Div. 230, note; *Graves v. Graves*, 3 Curt. Ec. 235, 7 Eng. Ec. 425.

<sup>5</sup> *Dillon v. Dillon*, supra; *Cane v. Cane*, 12 Stew. Ch. 148.

<sup>6</sup> *Moorsom v. Moorsom*, supra.

<sup>7</sup> *Lovering v. Lovering*, 3 Hag. Ec. 85, 5 Eng. Ec. 27; *Anichini v. Anichini*, 2 Curt. Ec. 210, 7 Eng. Ec. 85, 86.

<sup>8</sup> *Timmings v. Timmings*, 3 Hag. Ec. 76, 5 Eng. Ec. 22; *Dunn v. Dunn*, 2

*Phillim*. 403, 411, 1 Eng. Ec. 280, 284, where Sir John Nicholl says: "If the adultery is forgiven with such extreme facility as to show no sense of injury, and no care is taken to prevent it from happening again, then the husband has no ground for complaint, for he has encouraged the adultery by his conduct." But see s. c. in Court of Delegates, 3 *Phillim*. 6, 1 Eng. Ec. 353. And see observations of Sir John Nicholl, in *Durant v. Durant*, 1 Hag. Ec. 733, 3 Eng. Ec. 310, 316, 319, 323; *Lovering v. Lovering*, 3 Hag. Ec. 85, 5 Eng. Ec. 27; *Westmeath v. Westmeath*, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238, 290; *Walker v. Walker*, 2 *Phillim*. 153; *Gipps v. Gipps*, 3 Swab. & T. 116.

and having proof of it slept with her on the second, with no reason to believe she had repented, Lord Stowell held that from this prompt forgiveness of the first act a consent to the last should be inferred.<sup>1</sup> On the other hand, —

§ 239. **Wife's Condonation, distinguished.** — The English courts have looked more leniently on like conduct by the wife. Her power thus to bar herself is not denied; but there are circumstances wherein condonation would be considered a virtue in her when it would not be in him. And judges have refused to infer connivance against her when under like facts they would against him.<sup>2</sup> In reason, it is just to take into view the wife's dependent situation, and the more forgiving disposition of the sex; yet these considerations should not shut out inquiry into the real, probable condition of her mind, and the effect of her conduct on his.

§ 240. **Conduct after Knowledge**<sup>3</sup> — of the complained-of adultery, while not connivance itself, may be evidence of it. Thus, —

§ 241. **Indifference — Neglect to Prosecute.** — A total indifference to such adultery may lead to the inference of original consent;<sup>4</sup> as, for example, in a case of great and needless delay<sup>5</sup> to institute proceedings for divorce.<sup>6</sup> So —

§ 242. **Not interfering with Wife's Adultery or supporting her.** — A husband's neglect to interpose with his authority or apply for a divorce, while he knows his wife is living in adultery, is a fact

<sup>1</sup> Timmings v. Timmings, *supra*. See also Phillips v. Phillips, 1 Rob. Ec. 144, 158; Snow v. Snow, 2 Notes Cas. Supp. 1, 15.

<sup>2</sup> Angle v. Angle, 12 Jur. 525. And see observations of Sir John Nicholl, in Westmeath v. Westmeath, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238, 290.

<sup>3</sup> Ante, § 235.

<sup>4</sup> Stone v. Stone, 1 Rob. Ec. 99, 3 Notes Cas. 278, 307.

<sup>5</sup> Post, c. 12.

<sup>6</sup> Kirkwall v. Kirkwall, 2 Hag. Con. 277, 4 Eng. Ec. 541. This was a wife's suit, and Lord Stowell distinguished between her dilatoriness and his, to commence a prosecution "Though a husband," he said, "is bound to take prompt notice of the infidelity of his wife, and is liable to have his neglect for so doing urged against him when afterwards seeking his legal remedy, yet this doctrine is

not to be pressed against a wife unless in very particular cases." Even the husband's action is not necessarily to be instantaneous. "Certainly a wife would not be justified in living in the same house with her husband's concubine, sharing the turpitude of his crime, and partaking of a polluted bed; but she might have a reasonable hope of his return to her society, and forbearance under this *spes recuperandi* has never yet been held to constitute a bar to her legal remedy when every hope of that kind should be extinct." And see, in connection with this case, Ferrers v. Ferrers, 1 Hag. Con. 130, 4 Eng. Ec. 354; Angle v. Angle, 12 Jur. 525, 634, 640, 641; Reeves v. Reeves, 2 Phillim. 125, 1 Eng. Ec. 208; Ruding v. Ruding, 1 Hag. Ec. 740, note, 3 Eng. Ec. 314; Durant v. Durant, 1 Hag. Ec. 733, 760, 3 Eng. Ec. 310, 323; Walker v. Walker, 2 Phillim. 153.



more or less, according to the circumstances, evidencing his consent thereto.<sup>1</sup> And where a wife went with her children to reside in a gentleman's house as mistress of it, there living in adultery with him, and having three children there born, the husband not sufficiently accounting for his absence, or contributing to her support, or interfering with her, Sir William Wynne decided that he must be presumed to have consented to the adultery.<sup>2</sup> Doubtless, according to later opinions, facts like these should be taken into the account on a plea of connivance,<sup>3</sup> yet too great effect should not be given them. For when a wife has committed adultery, the husband is under no further obligation, legal or moral, to support her. Having justly and properly cast her off, how is he to compel her to leave her paramour? Plainly, in reason, it cannot be said that he connives at her adultery because he refuses to support her in it, or because he exercises no marital control over her person after he has rightfully ceased to afford her his marital protection. Some of the older English cases magnify the office of husband overmuch. And —

§ 243. **Articles of Separation** — may be so framed as to constitute a license to the wife to live in adultery; and if such is their true import, and the husband really meant it, he cannot have a divorce for the adultery to which he has thus consented. But though the consent is fairly deducible from the words, he may show by extrinsic evidence that such was not the meaning;<sup>4</sup> and he must show it or he cannot have a divorce.<sup>5</sup> The reason why, in this sort of case, a written instrument may be contradicted or qualified by parol, is explained in the first volume.<sup>6</sup> And the reader who consults the authorities will observe that the same learned judge who held the opposite doctrine under the title *Desertion* maintains the one here laid down under our present title. The usual covenants that the wife may dwell where and in such manner as she pleases and be free from the restraint of her husband, that he will not bring against her a suit for the restitution of conjugal rights, and others of like import, will not be construed as a

<sup>1</sup> *Crewe v. Crewe*, 3 Hag. Ec. 123, 131, 5 Eng. Ec. 45, 49.

<sup>2</sup> *Michelson v. Michelson*, 3 Hag. Ec. 147, 5 Eng. Ec. 56. And see *Crewe v. Crewe*, *supra*; *Whittington v. Whittington*, 2 Dev. & Bat. 64.

<sup>3</sup> See *Van Aernam v. Van Aernam*, 1 Barb. Ch. 375.

<sup>4</sup> Compare with *ante*, § 216.

<sup>5</sup> *Barker v. Barker*, 2 Add. Ec. 285, 2 Eng. Ec. 307; *Ross v. Ross*, Law Rep. 1 P. & M. 734, 737.

<sup>6</sup> Vol. I. § 1768, 1769.

consent to her living in adultery.<sup>1</sup> And if doubtful words admit of a construction favorable to innocence, it will be given them, rather than the other.<sup>2</sup> But, —

§ 244. **Bargaining away Rights.** — Though a wife is really unwilling her husband should live in adultery, yet if she consents for the sake of an allowance which he makes her in articles of separation, this is connivance, and it will bar her suit against him for a divorce.<sup>3</sup> In one case, Cresswell, J., said: “Here is a lady who, knowing that her husband had been and was then living in a state of adultery with this Elizabeth Hargrave, threatens him with proceedings in the Ecclesiastical Court, and then enters into a negotiation whereby a certain provision is made for her and her children in order to prevent further proceedings in chancery [where she had taken steps] and litigation in the Ecclesiastical Court. Is there any provision in the agreement that the husband is to cease, or is it contemplated by her that he should cease, to maintain his adulterous connection with the other woman? It is impossible to draw any other inference from this deed than that she was a consenting party to his continuing to live in a state of adultery.” Accordingly she was held to have bargained away her rights.<sup>4</sup> Even —

§ 245. **Husband's Connivance.** — Less, we have seen, will show connivance by the husband than by the wife.<sup>5</sup> As against him, it has been said to appear sufficiently from his refusal to see an act of adultery, or his abstaining from steps to prevent a consummation reasonably to be expected from what passes before his eyes.<sup>6</sup>

§ 246. **Verdict against Particeps Criminis.** — At the time when we received our unwritten law of this subject from England, it was there the common yet not legally necessary course for the husband, on learning of his wife's adultery, to take his first step by a common-law suit for damages against the *particeps criminis*. Then, bringing his divorce suit in the Ecclesiastical Court, he would plead this verdict, which, if in his favor, was considered as tending to rebut any presumption of connivance. Lord Stowell once explained its effect as follows: “The verdict giving such

<sup>1</sup> Sullivan v. Sullivan, 2 Add. Ec. 299,  
2 Eng. Ec. 314; Richardson v. Richardson,  
1 Hag. Ec. 6, 3 Eng. Ec. 13, 15.

<sup>2</sup> Studdy v. Studdy, 1 Swab. & T. 321.

<sup>3</sup> Ross v. Ross, Law Rep. 1 P. & M.  
734.

<sup>4</sup> Thomas v. Thomas, 2 Swab. & T.  
113, 118.

<sup>5</sup> Ante, § 228–233.

<sup>6</sup> Gipps v. Gipps, 11 H. L. Cas. 1, 3  
Swab. & T. 116. And see Boulting v.  
Boulting, 3 Swab. & T. 329.

large damages, it is forcibly contended, rebuts the argument of connivance; for it shows either that no such defence was attempted or that it was not proved. It has been often observed that a verdict to the disadvantage of the husband is strong evidence; because he is a party to both proceedings, and therefore such a verdict will operate in other courts; but a verdict against the adulterer is slight evidence against the wife, who is no party to the action, and who has no control in the conduct of it. At the time of the trial she is often at variance with the adulterer: he may have good reasons not to set up a defence which she may sustain. The defence of connivance is hazardous where the action is for damages, for it is to be proved by circumstances, and if it should fail it will inflame the damages.”<sup>1</sup>

§ 247. *With us*,—there are no precedents for this use of the verdict. And as the wife was not a party to the suit wherein it was rendered, we may doubt whether our courts would admit it, unless under very special circumstances for a merely limited purpose.

§ 248. *The Doctrine of this Chapter restated.*

Though the public is a party in the divorce suit, yet in respect of the defences this suit is conducted as a civil controversy between the husband and the wife. And neither can complain of the other's act to which he gave the concurrence of his will. Such concurrence is termed in divorce law connivance. This defence is in its nature common to all divorce suits; as, if a wife leaves her husband with his consent it is not desertion, if he whips her at her request it is not cruelty, or if every day he gets drunk because she persuades him to it the drunkenness is no ground for divorce. But in practical divorce law, connivance is almost always of the even more unnatural sort, namely, to adultery. Nothing can be more basely infamous or more degrading. Therefore the proof of it must be made by the party setting it up, and it must be clear and conclusive. The further particulars need not be repeated.

<sup>1</sup> *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 45, 42; *Phillips v. Phillips*, 1 Rob. Ec. 5 Eng. Ec. 28, 37. And see *Rix v. Rix*, 144, 156; *Halford v. Halford*, Poynter 3 Hag. Ec. 74, 5 Eng. Ec. 21, 22; *Crewe Mar. & Div.* 200, note; *Dunn v. Dunn*, 2 v. *Crewe*, 3 Hag. Ec. 123, 133, 5 Eng. Ec. Phillim. 403, 1 Eng. Ec. 280, 285.

## CHAPTER IX.

## COLLUSION.

§ 249. **Defined.** — Collusion in divorce law is a corrupt combining of married parties to procure a sentence or judicial order by some false practice; as, for one of them to appear to or in fact do what otherwise would be ground for divorce, or in any way to deceive the court in a cause, thus seeking its interposition as for a real injury.<sup>1</sup>

§ 250. **Compared with Connivance.** — It is perceived, therefore, that collusion is closely allied to the connivance treated of in the last chapter. Commonly but not necessarily, connivance comes from collusion, while ordinarily collusion is a species of connivance.<sup>2</sup>

§ 251. **Why bars Divorce.** — To the extent to which collusion is connivance, it bars divorce on the principles explained in the last chapter.<sup>3</sup> To the extent to which it is a conspiracy against justice, and an attempt to cheat the court, it stops the judicial wheels for the obvious reason that courts sit to advance justice and antagonize fraud. Hence we see that there may be a barring collusion even in a —

§ 252. **Good Case.** — In a just cause, there is ordinarily no motive for collusion. But sometimes parties think they may gain something by it; or, what is more frequent, there is a collateral motive for suppressing the truth and substituting a false case in

<sup>1</sup> *Crewe v. Crewe*, 3 Hag. Ec. 123, 5 Eng. Ec. 45, 48; 1 Fras. Dom. Rel. 703; *Jessop v. Jessop*, 2 Swab. & T. 301; *Todd v. Todd*, Law Rep. 1 P. & M. 121; *Stokes v. Anderson*, 118 Ind. 533. In the above case of *Crewe v. Crewe*, Lord Stowell defined collusion to be “an agreement between the parties for one to commit, or appear to commit, a fact of adultery, in order that the other may obtain a remedy

at law as for a real injury.” This definition was broad enough for the case in which it was given; but there are other forms of collusion, and I have endeavored so to frame my definition as to cover all.

<sup>2</sup> Probably there is a clerical error or misprint in Lord Stowell’s observations on this subject in *Crewe v. Crewe*, cited to the last section.

<sup>3</sup> Ante, § 204.

its stead.<sup>1</sup> And however just a cause may be, if parties collude in its management, so that in real fact both are plaintiffs, while by the record the one appears as plaintiff and the other as defendant, it cannot go forward.<sup>2</sup> It is so even where material facts are mutually suppressed while their production would not have changed the result.<sup>3</sup> All conduct of this sort, disturbing to the course of justice, falls within the general idea of fraud on the court, and of contempt of court.<sup>4</sup> Such is the doctrine in principle everywhere. In England, perhaps this conclusion is in dissolution cases aided by the terms of the Divorce Act, which are, that the petition shall be dismissed when “presented or prosecuted in collusion with either of the respondents.”<sup>5</sup> Now, —

§ 253. **Facilitating Justice — Obstructing it with Falsity.** — It can never be collusion for the defendant simply, and without any understanding with the plaintiff, to abstain from making a defence. But if there is a defence, — for example, if both parties are guilty, so that either could bring forward the other’s guilt in recrimination, — it is collusion for one by arrangement with the other to institute the suit which the other lets go by default, for the purpose of obtaining a divorce not justified by the real facts.<sup>6</sup> Yet an agreement between the parties, not involving an imposition upon the court or a suppression of facts, to facilitate the proofs and smooth the asperities of the litigation, is, though liable to be looked into by the court, not collusion or otherwise objectionable.<sup>7</sup> It may be meritorious. To illustrate, —

§ 254. **Instances.** — Where the respondent, not appearing, gave the solicitor of the petitioner a photograph to aid in her identification, and for the like purpose was present in court at the hearing, receiving £1 for her attendance, the divorce was granted. Said Cresswell, J.: “Such communications are always dangerous, and cannot fail to excite some suspicion of collusion. I took time

<sup>1</sup> *Stokes v. Anderson*, 118 Ind. 533; *Butler v. Butler*, 15 P. D. 13, 32, 66.

<sup>2</sup> *Lloyd v. Lloyd*, 1 Swab. & T. 567. See 1 *Bishop Crim. Law*, § 1010; *Smith v. Brown*, 3 Tex. 360, 49 Am. D. 748; *Butterworth v. Stagg*, 2 Johns. Cas. 291.

<sup>3</sup> *Hunt v. Hunt*, 47 Law J. n. s. Mat. 22, 39 Law T. n. s. 45; *Barnes v. Barnes*, Law Rep. 1 P. & M. 505, 507, 508; *Jessop v. Jessop*, 2 Swab. & T. 301; *Butler v. Butler*, supra.

<sup>4</sup> *Smith v. Brown and Butterworth v. Stagg*, supra.

<sup>5</sup> 20 & 21 Vict. c. 85, § 30, 31; post, § 357–363. For more of the statute, see Vol. I. § 153, note.

<sup>6</sup> *Gray v. Gray*, 2 Swab. & T. 554, 559.

<sup>7</sup> Anonymous, stated Vol. I. § 781, note; *Leavitt v. Leavitt*, 13 Mich. 452; *McCarthy v. McCarthy*, 36 Conn. 177; *Shaw v. Gould*, Law Rep. 3 H. L. 55, 77. See *Smith v. Smith*, Wright, 643.

to examine the evidence, and I see no reason to believe that the parties were acting in collusion, and therefore pronounce a decree.”<sup>1</sup> In another case, in view of different evidence, the judge ordinary said: “I see no impropriety in a husband making his wife a reasonable allowance whilst a suit is pending, in order to save the expense of an application to the court for alimony. If that evidence stood alone, I should hold that it is not sufficient to prove the charge of collusion, but the evidence goes much further. It amounted, in substance, to this, that the petitioner said to the respondent, ‘If you don’t oppose, I shall get a divorce cheaper than if you do; therefore keep quiet, and I will give you some money when the decree is obtained, and I will do no harm to the co-respondent.’ If that is not collusion, I do not know what is. It is said that she had no defence to offer, and it certainly seems that she had not, as far as her own adultery is concerned. But if she had brought to the knowledge of the court the facts which have now been proved as to the petitioner’s conduct in exposing her to temptation, it would have been a grave question whether the court would have granted a decree.” Therefore, though a decree *nisi* had been rendered in favor of the petitioner, it was rescinded and the petition dismissed.<sup>2</sup>

§ 255. **Both Parties**,—to make out a case of collusion, must combine, collusion being a conspiracy.<sup>3</sup> And nothing is collusion which does not implicate the one against whom it is set up.<sup>4</sup> For which and other reasons,—

§ 256. **Desiring Divorce — Offending in Hope of it.**—It is not collusion for one guilty of a matrimonial offence to desire to be divorced; or for one to commit such offence, expecting, while furnishing ground for divorce, to stimulate thereby the other party to apply for it; or, where cause exists, for both to wish the matrimonial relation suspended or dissolved,—none of these things, no analogous things, will constitute collusion.<sup>5</sup> The question is whether the plaintiff has suffered a real injury, and *bona fide* seeks relief; if so, there is no collusion.<sup>6</sup> To hold that the inno-

<sup>1</sup> Harris v. Harris, 4 Swab. & T. 232, 233.

<sup>2</sup> Barnes v. Barnes, Law Rep. 1 P. & M. 505, 507, 508.

<sup>3</sup> Ante, § 249, 251.

<sup>4</sup> 1 Fras. Dom. Rel. 703.

<sup>5</sup> Utterton v. Tewsh, Ferg. 23, 4 Eng.

Ec. 347, 358; Kibblewhite v. Rowland, Ferg. 226, 233, 3 Eng. Ec. 406, 408; Sugden v. Lolly, Ferg. App. 269, 3 Eng. Ec. 426; Note (B), Ferg. 363, 3 Eng. Ec. 482.

<sup>6</sup> Crewe v. Crewe, 3 Hag. Ec. 123, 5 Eng. Ec. 45, 48, 49; Brealy v. Reed, 2

cent party should be refused the remedy simply because the other desires it, putting it therefore in the power of the delinquent to arrest the course of justice, would be, in effect, to allow a divorce when the defendant had gone a certain way in matrimonial wickedness, but to refuse it when he had taken another step. Yet —

§ 257. **Offending by Agreement.** — It is collusion for one to commit a matrimonial offence pursuant to a bargaining with the other, who is to institute a divorce suit therefor. For example, a husband deserted his wife, for whom he declared he had never any love, but in response to her entreaties to be permitted to return to him he said he would give her ground for divorce; thereupon she had him watched, and then he wrote her that he had fulfilled his promise. She was held to be barred of her remedy though the adultery was proved.<sup>1</sup> So, —

§ 258. **Plaintiff acting for Defendant.** — If the suit is carried on by a plaintiff, not from his own desire for divorce, but for the benefit and at the request of the defendant, any one of several reasons will prompt its dismissal. And as a fraud on and contempt of the court,<sup>2</sup> it is classed as collusion.<sup>3</sup>

§ 259. **Must be proved — Burden.** — Like connivance,<sup>4</sup> collusion, to bar a divorce, must be affirmatively proved, either directly or by facts sufficiently presumptive.<sup>5</sup> For mere suspicion will no more justify the withholding of action than it will justify action.<sup>6</sup> But —

§ 260. **Arousing Vigilance.** — What is termed the vigilance of the court will be aroused by slight circumstances, quite inadequate to prove collusion, yet demanding special scrutiny of every part of the evidence.<sup>7</sup> As once said by Lord Stowell: "There are circumstances in this case which alarm the jealousy of the court, as appearing a little suspicious. There is no plea on the part of the wife, nor are any interrogatories administered. The ver-

Curt. Ec. 833, 7 Eng. Ec. 328; Shelf. Mar. & Div. 738. See *Mansfield v. Mansfield*, Wright, 284.

<sup>1</sup> *Todd v. Todd*, Law Rep. 1 P. & M. 121.

<sup>2</sup> Ante, § 252.

<sup>3</sup> *Lloyd v. Lloyd*, 1 Swab. & T. 567, 573.

<sup>4</sup> Ante, § 224.

<sup>5</sup> *Pollard v. Wybourn*, 1 Hag. Ec. 725, 3 Eng. Ec. 308; *Deane v. Deane*, 12 Jur. 63, 64.

<sup>6</sup> *Baily v. Baily*, 1 Lee, 536. See *Emmons v. Emmons*, Walk. Mich. 532; *Hanks v. Hanks*, 3 Edw. Ch. 469; a rule of court (N. Y. Rule, 168) made it necessary for the plaintiff to aver "that the adultery charged in such bill was committed without his consent, connivance, privity, or procurement." As to which see also *Simons v. Simons*, 47 Mich. 253; *Farace v. Farace*, 61 How. Pr. 61.

<sup>7</sup> E. B. v. E. C. B. 28 Barb. 299.

dict, which has been pleaded,<sup>1</sup> was obtained nearly on default, and without any defence. This proves a great facility, at least, and will make the court more vigilant to see that the two main points of such cases are sufficiently proved; namely, the criminal act, and that the person against whom the proof of that act is established was the wife.”<sup>2</sup> In an Ohio case of aroused suspicion with no adequate proof of collusion, the plaintiff was given his choice to have his bill dismissed without prejudice, or continued that he might produce further evidence. He elected the latter, and on a subsequent hearing had his decree for a divorce.<sup>3</sup>

§ 261. **Confessions of Guilt**, — when introduced as a part of the plaintiff's proofs, may and sometimes must be strengthened by his affirmatively showing that there was no collusion.<sup>4</sup>

§ 262. **Confessions of Collusion**. — Since collusion exists only where the plaintiff is a party to it,<sup>5</sup> a mere unaided confession of it by the defendant, not in the plaintiff's presence or otherwise communicated to him, is not admissible in proof thereof.<sup>6</sup>

§ 263. **Plaintiff negating Collusion**. — There are States wherein, by rule of court or by statute, the plaintiff is required in his bill or libel or in an accompanying affidavit to deny collusion, and then to satisfy the court by affirmative proofs that there is none.<sup>7</sup> And —

§ 264. **Oath of Calumny — (Scotch Practice)**. — In Scotland, to prevent collusion, the pursuer is in all cases required to take what in the Scotch books is termed the “Oath of Calumny.” “It declares,” says Fraser, “that he has just cause to insist on the action, because he believes (supposing it to be divorce for adultery) that the defender has been guilty of adultery, and that the libel is true; that there is no collusion between the parties to obtain the decree, and no agreement between any other persons on his behalf for that purpose. . . . Prior to the emission of the oath, it is competent for any party having interest, such as the creditors of the defender, or for the court *ex officio*, to show that there is collusion; and this may be by the examination of wit-

<sup>1</sup> Ante, § 246.

<sup>2</sup> Williams v. Williams, 1 Hag. Con. 299, 4 Eng. Ec. 415.

<sup>3</sup> Wolf v. Wolf, Wright, 243. See also (and quære) Smith v. Smith, Wright, 643; Friend v. Friend, Wright, 639.

<sup>4</sup> Greenstreet v. Cumyns, 2 Phillim. 10, 1 Eng. Ec. 165, 166; s. c. 2 Hag. Con.

332. And see Powell v. Powell, 80 Ala. 595.

<sup>5</sup> Ante, § 255, 257.

<sup>6</sup> Gray v. Gray, 2 Swab. & T. 554.

<sup>7</sup> Sickles v. Carson, 11 C. E. Green, 440, 442; ante, § 259, note. And see Emmons v. Emmons, Walk. Mich. 532; post, § 620.



nesses, or letters, or the parties themselves. After the oath of calumny has been emitted, it is incompetent to inquire further as to whether there was collusion.”<sup>1</sup> Fergusson tells us that “the parties who commit this offence against the course of justice have such facility of concealment, and the inquiry is of so difficult and unpleasant a nature, that the records of the Consistorial Court of Scotland do not, perhaps, exhibit a single attempt to detect this malpractice which has been successful in the result.”<sup>2</sup> In like manner, —

§ 265. **Now in England — (Oath — Queen’s Proctor intervening).** — The present English statutes provide, 20 & 21 Vict. c. 85, § 41, that “every person seeking a decree, &c., shall, together with the petition or other application for the same, file an affidavit verifying the same so far as he or she is able to do so, and stating that there is not any collusion or connivance between the deponent and the other party to the marriage;” and, 23 & 24 Vict. c. 144, § 7,<sup>3</sup> that, where collusion is suspected, the Queen’s Proctor may intervene.<sup>4</sup> Still a defendant who relies on collusion must set it up in allegation.<sup>5</sup>

### § 266. *The Doctrine of this Chapter restated.*

Collusion is either a branch of connivance or a conspiracy to cheat the court, or both. In any view, a divorce will not be granted where it appears. And where it does not sufficiently appear, still if the case discloses what may create suspicion of it, the vigilance of the bench will be specially aroused to discover and avert imposition and detect weaknesses in the proofs.

<sup>1</sup> 1 Fras. Dom. Rel. 701, 702.

<sup>2</sup> Ferg. 363, 3 Eng. Ec. 482; 1 Fras. Dom. Rel. 703. Something like the oath of calumny was required of the applicant for divorce before the House of Lords. Simmons’s Divorce Bill, 12 Cl. & F. 339.

<sup>3</sup> For a more particular statement of this statute and the amendatory acts, see Vol. I. § 153, note.

<sup>4</sup> See, among other cases of intervention under this latter statute, Drummond v. Drummond, 2 Swab. & T. 269; Gray v. Gray, 2 Swab. & T. 263, 276, 554; Cox v. Cox, 2 Swab. & T. 306; Jessop v. Jessop, 2 Swab. & T. 301; Latour v. Latour, 2 Swab. & T. 524; Gethin v. Gethin, 2 Swab. & T. 560; Marris v. Marris, 2 Swab. & T. 530; Boulton v. Boulton, 2 Swab. & T.

638; Pollack v. Pollack, 2 Swab. & T. 648. These cases, it is perceived, are from a single volume of the reports. They appear to continue equally abundant. This intervention of the Queen’s Proctor, therefore, is a large branch of the English divorce business. I am not sufficiently acquainted with the undercurrents to be able to state whether it is all and in every sense legitimate, or whether it is chiefly or also one of the outside modes of defence really resorted to by defendants. I think “Yankee” defendants would be able to utilize a governmental provision like this; making the public good serve admirably their private ends.

<sup>5</sup> Jessop v. Jessop, 2 Swab. & T. 301, 303.

## CHAPTER X.

## CONDONATION.

- § 267. Introduction.
- 268-288. General Doctrine with Illustrations.
- 289-300. Knowledge of and Ability to prove Offence.
- 301-307. Specially of Condonation of Cruelty.
- 308-323. The Condition in Condonation.
- 324-327. Law and Evidence distinguished.
- 328-331. The Evidence.
- 332-335. Statutes on this Subject.
- 336. Doctrine of Chapter restated.

§ 267. **How Chapter divided.** — We shall consider, I. The General Doctrine with Illustrations; II. The Knowledge of and Ability to prove the Offence condoned; III. Specially of the Condonation of Cruelty; IV. The Condition in Condonation; V. The Distinction between the Law and the Evidence; VI. The Evidence; VII. Statutes relating to this Subject.

I. *The General Doctrine with Illustrations.*

§ 268. **Forgiveness and Reconciliation.** — Sin and pardon, the latter taking away the punishment from the former, walk hand in hand through all that part of the universe of which man has any knowledge. So that in matrimonial law, if one of the parties has forgiven an offence which he knows the other has committed, there can be no divorce. The remission is not necessarily absolute, it may be upon a lawful and proper condition. Consequently, looking to the law as adjudged, —

§ 269. **Defined.** — Condonation is the remission, by one of the married parties, of an offence which he knows the other has committed against the marriage, on the condition<sup>1</sup> of being contin-

<sup>1</sup> *Ferrers v. Ferrers*. 1 Hag. Con. 130, 1 Hag. Ec. 773, 781, 3 Eng. Ec. 329, 334; 4 Eng. Ec. 354; *D'Aguilar v. D'Aguilar*, *Westmeath v. Westmeath*, 2 Hag. Ec.

ually afterward treated by the other with conjugal kindness,—resulting in the rule that while the condition remains unbroken there can be no divorce, but a breach of it revives the original remedy.<sup>1</sup>

§ 270. **Whence this Definition.**—Definition in the law being legal doctrine epitomized,<sup>2</sup> this one is but a preliminary statement in brief of what the chapter will disclose. And its accuracy is to be determined simply by a comparison of it with the detailed doctrines of the chapter. As to—

§ 271. **Other Definitions.**—The books do not abound in them. Perhaps the earliest in any English book is one given in 1858 by the judge ordinary to the jury, as follows: “Condonation means a blotting out of the offence imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed.”<sup>3</sup> The conditional quality of it was not material under the facts of the case; if it had been, doubtless the word “conditional” would have been inserted before “blotting.” So was it, in substance, in a subsequent case,—the same judge observing that “condonation means forgiveness with a condition.”<sup>4</sup> The learned judge ordinary who thus defined condonation to the jury, added that it means something more than forgiveness; it includes a reinstating of the wife in her former matrimonial position toward the husband. On a motion to set aside the verdict because of inaccuracy in this outline of doctrine, the full bench of judges held it to be correct. Said the Lord Chancellor, Chelmsford: “I think that the forgiveness which is to take away the husband’s right to a divorce must not fall short of reconciliation, and that this must be shown by the reinstatement of the wife in her former position; which renders proof of conjugal cohabitation, or the restitution of conjugal rights, necessary.”<sup>5</sup> This definition, occurring in an instruction to the jury, was necessarily spoken

Supp. 1, 4 Eng. Ec. 238, 289; Worsley v. Worsley, 2 Lee, 572, 6 Eng. Ec. 249; Smith v. Smith, 4 Paige, 432, 27 Am. D. 75; Durant v. Durant, 1 Hag. Ec. 733, 3 Eng. Ec. 310, 323; Snow v. Snow, 2 Notes Cas. Supp. 1, 12; Farnham v. Farnham, 73 Ill. 497; Cooke v. Cooke, 3 Swab. & T. 246, 247; Wessels v. Wessels, 28 Ill. Ap. 253.

<sup>1</sup> Post, § 308; Johnson v. Johnson, 4 Paige, 460, 1 Edw. Ch. 439; 1 Fras. Dom. Rel. 462, 666. See note to Best v. Best, 1 Add. Ec. 411, 2 Eng. Ec. 158, 159;

Quincy v. Quincy, 10 N. H. 272; Anonymous, 6 Mass. 147. And see Adams v. Adams, Law Rep. 1 P. & M. 333. But as to the Pennsylvania law, see Bronson v. Bronson, 7 Philad. 405.

<sup>2</sup> Vol. I. § 12.

<sup>3</sup> Keats v. Keats, 1 Swab. & T. 334, 346.

<sup>4</sup> Dent v. Dent, 4 Swab. & T. 105, 107.

<sup>5</sup> Keats v. Keats, 1 Swab. & T. 334, 346, 357. This is a case of great interest. And see Ratcliff v. Ratcliff, 1 Swab. & T. 467, 473, as in effect affirming this doctrine.

with reference to the particular facts then in controversy, by which facts it must be interpreted and qualified.<sup>1</sup> While, therefore, as thus viewed, it is beyond doubt correct, it is not quite so as general doctrine. For, as we shall see in the course of this chapter, a condonation does not in the full sense “restore the offending party to the same position he or she occupied before the offence was committed.” If it did, it would not be conditional. As it is, the offending party is liable, on a breach of the condition, to be divorced for the offence condoned, as well as for any subsequent offence.

§ 272. **Actual or Presumptive.**—It is neither necessary nor common for the condonation to be made by a formal writing, or orally in the presence of witnesses, or evidently even by words uttered privately. In the ordinary case, as disclosed in the books, it is —

§ 273. **Presumed from Cohabitation.**—After a husband, for example, comes into possession of the fact and proof that his wife has committed adultery, if he has marital intercourse with her, the law<sup>2</sup> presumes that he condoned the offence, and refuses him divorce.<sup>3</sup>

§ 274. **Words alone—Receiving back—Accepting Forgiveness.**—There are in the books expressions to the effect that condonation may be as well by words as by acts;<sup>4</sup> in the language of Lord Stowell, “it may be express or implied.”<sup>5</sup> Properly understood, these expressions are doubtless correct. But we have seen that by later English utterances condonation means more than forgiveness,—it is a receiving of the wife back and reinstating her in her former position.<sup>6</sup> So that a mere verbal condonation, with no act following, should be interpreted simply as a promise or offer to condone. For so is our entire law of civil<sup>7</sup> and criminal<sup>8</sup> wrongs;

<sup>1</sup> Vol. I. § 111; Bishop Non-Con. Law, § 1320–1325.

<sup>2</sup> Post, § 285.

<sup>3</sup> Post, § 290; Snow v. Snow, 2 Notes Cas. Supp. 13; Dillon v. Dillon, 3 Curt. Ec. 86; Timmings v. Timmings, 3 Hag. Ec. 76, 5 Eng. Ec. 22; Hoffman v. Hoffman, 46 N. Y. 30, 7 Am. R. 299; Pitts v. Pitts, 52 N. Y. 593; Burns v. Burns, 60 Ind. 259; Farmer v. Farmer, 86 Ala. 322; Sparks v. Sparks, 94 N. C. 527; Doe v. Doe, 52 Hun, 405; Eggerth v. Eggerth, 15 Or. 626.

<sup>4</sup> Quincy v. Quincy, 10 N. H. 272; Beeby v. Beeby, 1 Hag. Ec. 789, 793, 3 Eng. Ec. 338, 340; Snow v. Snow, 2 Notes Cas. Supp. 1, 12.

<sup>5</sup> Beeby v. Beeby, supra.

<sup>6</sup> Ante, § 271; post, § 275. And see Newsome v. Newsome, Law Rep. 2 P. & M. 306, 1 Eng. Rep. 241; Van Order v. Van Order, 8 Hun, 315; Sewall v. Sewall, 122 Mass. 156, 23 Am. R. 299.

<sup>7</sup> Bishop Non-Con. Law, § 22–34.

<sup>8</sup> 1 Bishop Crim. Law, § 204, 206.

an evil purpose is not cognizable by the law until it has developed in some act, and the same rule may well be applied to the remission of an injury. At least, there should in reason be an acceptance of the forgiveness; as, a pardon is a remission of criminal guilt, but to be valid it must be accepted.<sup>1</sup> Yet this sort of question can seldom arise; for in the facts of cases there will almost of necessity be something more than mere words. Within this doctrine, —

§ 275. **Offer or Promise.** — An invitation to resume a suspended cohabitation, or a promise of future condonation, with no acceptance by the other party, is not such forgiveness as will bar a divorce.<sup>2</sup> We have in one case a *dictum* to the effect that a husband's unsuccessful endeavor to induce his guilty wife to come back to him, "made with knowledge of the fact, was a waiver of any right to relief."<sup>3</sup> But this is contrary both to the decisions and to the entire spirit of our jurisprudence, which binds no one by an unaccepted offer, and punishes no one for a thought not developed in action. Still, —

§ 276. **Some Effect** — (**Cruelty**). — There may be circumstances in which such mere offer would be relevant in evidence and of some effect; as, coming from a wife complaining of cruelty, it might tend to show that she did not believe there was personal danger<sup>4</sup> in the cohabitation. And perhaps it would sometimes afford auxiliary proof of condonation.<sup>5</sup>

§ 277. **Cohabitation Voluntary** — (**Fear**). — A cohabitation, to imply condonation, must be voluntary. For example, a wife forced by her husband,<sup>6</sup> or constrained to his bed through fear of him, does not condone his offence.<sup>7</sup> And the subjection under which the law places her must, on this question, be taken into the account in her favor;<sup>8</sup> so that condonation will not be implied against her in all the circumstances wherein it would be against him.<sup>9</sup>

<sup>1</sup> 1 Bishop Crim. Law, § 898, 907.

<sup>2</sup> *Keats v. Keats*, 1 Swab. & T. 334; *Popkin v. Popkin*, 1 Hag. Ec. 766, 3 Eng. Ec. 325, 326; *Ferrers v. Ferrers*, 1 Hag. Ec. 781, note, 3 Eng. Ec. 334; *Quarles v. Quarles*, 19 Ala. 363; *Peacock v. Peacock*, 1 Swab. & T. 183; *Severn v. Severn*, 3 Grant, U. C. Ch. 431.

<sup>3</sup> *Christianberry v. Christianberry*, 3 Blackf. 202, 204, 25 Am. D. 96.

<sup>4</sup> Vol. I. § 1536, 1538, 1542.

<sup>5</sup> *Johns v. Johns*, 29 Ga. 718.

<sup>6</sup> *Harnett v. Harnett*, 55 Iowa, 45.

<sup>7</sup> *Turner v. Turner*, 2 Spinks, 201, note; *Cooke v. Cooke*, 3 Swab. & T. 126, 135. And see *Betz v. Betz*, 2 Rob. N. Y. 694; *Stevens v. Stevens*, 1 McCarter 374; *Sapp v. Sapp*, 71 Tex. 348.

<sup>8</sup> See, for the principle, *Coleman v. Coleman*, Law Rep. 1 P. & M. 81.

<sup>9</sup> Post, § 284.

§ 278. **By Order of Court.** — Cohabitation under judicial order — as, on a suit for the restitution of conjugal rights — is not condonation because not voluntary.<sup>1</sup>

§ 279. **Nature of the Cohabitation.** — Though, to employ language accurately, there may be cohabitation without sexual intercourse,<sup>2</sup> yet such mere continuing to abide in the one house or family does not in all circumstances carry with it condonation; as, for example, —

§ 280. **Separate Beds.** — If the parties have separate beds, with no sexual intercourse, condonation is not always to be inferred from their living in the same house together.<sup>3</sup> Poynter says it is not necessary “that a husband should instantly close his doors upon an offending, and, it may be, repentant wife; recollecting her former innocence, he may indulge, at least, in some feelings of pity for her degraded situation, and until a fit retirement is provided allow her the protection of his roof, but not the solace of his bed.” Yet he deems that “condonation might *possibly* be inferred, more particularly against the husband, if within a reasonable time the parties do not entirely separate.”<sup>4</sup> In applying this doctrine, —

§ 281. **Intercourse presumed or not.** — Married persons living in the same house are *prima facie* presumed to have matrimonial intercourse; but this inference may be repelled by the circumstances of the particular case.<sup>5</sup> On the other hand, if the husband has sent his wife away, and she alleges a condonation by commerce with her afterward, she must prove it by clear and distinct evidence.<sup>6</sup>

<sup>1</sup> Wilson v. Wilson, 6 Moore P. C. 484.

<sup>2</sup> Vol. I. § 1669 and note.

<sup>3</sup> Dance v. Dance, 1 Hag. Ec. 794, note, 3 Eng. Ec. 341; 1 Fras. Dom. Rel. 666; Westmeath v. Westmeath, 2 Hag. Ec. Supp. 1, 118, 4 Eng. Ec. 238, 292; D'Aguilar v. D'Aguilar, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 335; Snow v. Snow, 2 Notes Cas. Supp. 1, 16; Jacobs v. Tobelman, 36 La. An. 842; Guthrie v. Guthrie, 26 Mo. Ap. 566; Harnett v. Harnett, 59 Iowa, 401. In Westmeath v. Westmeath, a husband who had inflicted cruelty on his wife, resulting in a separation under articles, brought afterward a suit for the restitution of conjugal rights. She answered by setting up the cruelty, and prayed for a divorce; to escape which, he alleged con-

donation. And the court held that her permitting him, at the urgent request of himself and mutual friends, to occupy for a short time a separate bedroom in her house, and to dine with her, in order to keep the rupture from becoming public, was not condonation; neither did it prove that she did not consider cohabitation unsafe.

<sup>4</sup> Poynter Mar. & Div. 236. But see Wright v. Wright, 6 Tex. 3.

<sup>5</sup> Beeby v. Beeby, 1 Hag. Ec. 789, 3 Eng. Ec. 338, 342; Snow v. Snow, 2 Notes Cas. Supp. 1, 13; 1 Fras. Dom. Rel. 666; Betz v. Betz, 2 Rob. N. Y. 694; Burns v. Burns, 60 Ind. 259.

<sup>6</sup> Campbell v. Campbell, Deane & S. 285.

§ 282. **Extent of Cohabitation to condone.** — In circumstances inferring condonation from cohabitation, there need not be long-continued matrimonial intercourse; it is enough, at least against the husband, that he has been once in bed with his wife after learning of her adultery.<sup>1</sup> It appears to be so also, in some circumstances, even as against the wife.<sup>2</sup> Yet the doctrine is not absolute and free from exception; for, since not always does sexual intercourse with knowledge of the offence carry with it condonation,<sup>3</sup> *a fortiori* there can be no absolute standard of the extent thereof which will suffice or not. To illustrate, —

§ 283. **Adultery or Cruelty.** — As we shall see in a subsequent sub-title, there is a difference in respect of condonation between adultery and cruelty.<sup>4</sup> And —

§ 284. **Specially of Wife condoning.** — Condonation is not so easily inferred and is not so strict a bar against the wife as against the husband.<sup>5</sup> “A woman,” says Lord Stowell, “has not the same control over her husband, has not the same guard over his honor, has not the same means to enforce the matrimonial vow; his guilt is not of the same consequence to her; therefore the rule of condonation is held more laxly against the wife.”<sup>6</sup> Again: “She may find a difficulty either in quitting his house or withdrawing from his bed. The husband, on the other hand, cannot be compelled to the bed of his wife; a woman may submit to necessity.”<sup>7</sup> It is too hard to term submission mere hypocrisy. It may be a weakness, pardonable in many circumstances.”<sup>8</sup> But this discrimination in favor of the wife should be kept within

<sup>1</sup> *Hutchinson v. Hutchinson*, a Scotch case, cited 1 *Fras. Dom. Rel.* 667; *Timnings v. Timmings*, 3 *Hag. Ec.* 76, 5 *Eng. Ec.* 22; *Snow v. Snow*, 2 *Notes Cas. Supp.* 1, 14. See *Newsome v. Newsome*, *Law Rep.* 2 *P. & M.* 306, 311, 1 *Eng. Rep.* 241.

<sup>2</sup> *Delliber v. Delliber*, 9 *Conn.* 233. See, however, *Gardner v. Gardner*, 2 *Gray*, 434; *Armstrong v. Armstrong*, 32 *Missis.* 279, 290, 298.

<sup>3</sup> *Ante*, § 277, 278; *Clark v. Clark*, 29 *Ill. Ap.* 257, 259.

<sup>4</sup> *Snow v. Snow*, 2 *Notes Cas. Supp.* 1.

<sup>5</sup> *Ante*, § 277; *Wood v. Wood*, 2 *Paige*, 108; *Angle v. Angle*, 1 *Rob. Ec.* 634, 640, 641; *Dance v. Dance*, 1 *Hag. Ec.* 794, note, 3 *Eng. Ec.* 341; *Westmeath v. Westmeath*, 2 *Hag. Ec. Supp.* 1, 4 *Eng. Ec.*

238, 290; *Turton v. Turton*, 3 *Hag. Ec.* 338, 350, 5 *Eng. Ec.* 130; *Walker v. Walker*, 2 *Phillim.* 153, 156; *Bowie v. Bowie*, 3 *Md. Ch.* 51; *Gardner v. Gardner*, 2 *Gray*, 434, 441; *Armstrong v. Armstrong*, 32 *Missis.* 279, 290, 298; *Phillips v. Phillips*, 1 *Bradw.* 245; 1 *Fras. Dom. Rel.* 667.

<sup>6</sup> *D'Aguilar v. D'Aguilar*, 1 *Hag. Ec.* 773, 786, 3 *Eng. Ec.* 329, 337.

<sup>7</sup> *Ante*, § 277, 278.

<sup>8</sup> *Beeby v. Beeby*, 1 *Hag. Ec.* 789, 3 *Eng. Ec.* 338, 341. See also *Delliber v. Delliber*, 9 *Conn.* 233. And see remarks of Lord Meadowbank, in *Greenhill v. Ford*, cited 1 *Fras. Dom. Rel.* 667; and of Sir John Nicholl, in *Durant v. Durant*, 1 *Hag. Ec.* 733, 3 *Eng. Ec.* 310, 319.

the reasons wherefrom it proceeds. It will not justify her, for example, in living in the same house with her husband's concubine and sharing in the polluted bed.<sup>1</sup> So if she is residing beyond his reach, — as, with her father or brother, — it has in Scotland been deemed that the same circumstances which would show a condonation by him will show a like condonation by her.<sup>2</sup> In harmony with this enlightened view, Lord Stowell, in an English case, said: "It is material to observe how the return to cohabitation was brought about; as it will weigh, whether there was a condonation, and what was the effect."<sup>3</sup>

§ 285. **Conclusiveness from Cohabitation.** — Plainly in reason, on a question not directly adjudged, if the cohabitation which presumes condonation transpires,<sup>4</sup> the parties cannot prevent its having this effect by any bargaining to the contrary. Otherwise the marriage would thereafter be in the parties' own hands, to dissolve it or not as they might at any time choose, contrary to the policy of the law. And in the words of Parsons, C. J.: "It would be injustice to the wife, and immoral in the husband, to claim and enjoy as his peculiar marital rights the society of his wife, after a knowledge of her offence, and afterwards to cast her off for that same offence."<sup>5</sup> Unlike this presumption from cohabitation is that from a plaintiff's —

§ 286. **Neglect to prosecute Suit begun — (Wife).** — The effect of delay in bringing a divorce suit is for another chapter.<sup>6</sup> Condonation may sometimes be inferred from the party's neglecting to prosecute such suit already begun.<sup>7</sup> Evidently this presumption, unlike the other, is of mere fact, so not conclusive.<sup>8</sup> Moreover, contrary to the general rule,<sup>9</sup> such neglect is deemed to press more heavily against the wife than the husband.<sup>10</sup> A reason for which is that after she has commenced her suit, not only is she out of his power, but she may ordinarily compel him to provide the means to carry it on; while he, if plaintiff, might be constrained to discontinue it from poverty. Moreover, —

<sup>1</sup> *Kirkwall v. Kirkwall*, 2 Hag. Con. 277.

<sup>2</sup> *Lothian on Consist. Law*, 163; 1 *Fras. Dom. Rel.* 668. See *Bowie v. Bowie*, 3 Md. Ch. 51.

<sup>3</sup> *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773, 781, 3 Eng. Ec. 329, 334.

<sup>4</sup> *Ante*, § 273.

<sup>5</sup> *Anonymous*, 6 Mass. 147, 148.

<sup>6</sup> *Post*, c. 12; *Smith v. Smith*, 43 N. H. 234.

<sup>7</sup> *Walker v. Walker*, 2 Phillim. 153.

<sup>8</sup> And compare with *ante*, § 274, 275.

<sup>9</sup> *Ante*, § 284.

<sup>10</sup> *Betcher v. Betcher*, cited 2 Phillim. 155.



§ 287. **Dismissal by Agreement.** — The dismissal of a suit, by agreement of the parties, was once held to bar a future one for the same cause; the entire transaction, it appears, being deemed a sort of condonation.<sup>1</sup> Plainly this could not operate as an estoppel, and its effect as evidence of condonation must depend on the terms of the agreement and accompanying circumstances.<sup>2</sup>

§ 288. **Articles of Separation**<sup>3</sup> — may be in terms which, in some circumstances,<sup>4</sup> will render them a condonation barring divorce,<sup>5</sup> but such is not their necessary effect.<sup>6</sup>

## II. *The Knowledge of and Ability to prove the Offence condoned.*

§ 289. **Knowledge.** — In the nature of things, one cannot forgive an unknown injury. So that both in reason and in law, knowledge of a matrimonial offence is an essential element in a condonation thereof.<sup>7</sup> Out of this doctrine grow such minor ones as —

§ 290. **Cohabiting with Knowledge.** — Whenever a married party has become aware of the other's breach of matrimonial duty justifying divorce, if, in the absence of special facts creating an exception,<sup>8</sup> he continues or renews the cohabitation, he is presumed to have condoned the offence;<sup>9</sup> for no man, says the law,<sup>10</sup> would

<sup>1</sup> Smyth v. Smyth, 4 Hag. Ec. 509, 514.

<sup>2</sup> And see Graham v. Graham, 5 Scotch Sess. Cas. 4th ser. 1093; Sparks v. Sparks, 94 N. C. 527.

<sup>3</sup> Vol. I. § 1260-1312.

<sup>4</sup> Ante, § 274-276; Cumming v. Cumming, 135 Mass. 386, 46 Am. R. 476.

<sup>5</sup> Vol. I. § 1282, 1310; Squires v. Squires, 53 Vt. 208, 38 Am. R. 668; Rose v. Rose, 7 P. D. 225, 8 P. D. 98.

<sup>6</sup> Ib.; Moore v. Moore, 12 P. D. 193. And see post, § 445.

<sup>7</sup> Durant v. Durant, 1 Hag. Ec. 733, 751, 3 Eng. Ec. 310, 319; Popkin v. Popkin, 1 Hag. Ec. 768, note, 4 Eng. Ec. 325, 326; Keats v. Keats, 1 Swab. & T. 334; Odom v. Odom, 36 Ga. 286; Turnbull v. Turnbull, 23 Ark. 615; Thomas v. Thomas, 2 Coldw. 123; Ellis v. Ellis, 4 Swab. & T. 154; Burns v. Burns, 60 Ind. 259; Phillips v. Phillips, 1 Bradw. 245.

<sup>8</sup> For example, ante, § 277, 278, 282-284; post, § 298, 299.

<sup>9</sup> Ante, § 273; Delliber v. Delliber, 9 Conn. 233; Williamson v. Williamson, 1 Johns. Ch. 488; Dysart v. Dysart, 1 Rob. Ec. 106, 108; Phillips v. Phillips, 4 Blackf. 131; Wood v. Wood, 2 Paige, 108; McDwire v. McDwire, Wright, 354; Threewits v. Threewits, 4 Des. 560; Johnson v. Johnson, 4 Paige, 460; Mayhugh v. Mayhugh, 7 B. Monr. 424; Hall v. Hall, 4 N. H. 462; Quincy v. Quincy, 10 N. H. 272; Barnes v. Barnes, Wright, 475; Questel v. Questel, Wright, 491; Cooper v. Cooper, 10 La. 249; 1 Fras. Dom. Rel. 666; Snow v. Snow, 2 Notes Cas. Supp. 1, 12; Buckholts v. Buckholts, 24 Ga. 238; Marsh v. Marsh, 2 Beasley, 281; Backus v. Backus, 3 Greenl. 136; Twyman v. Twyman, 27 Mo. 383; Harper v. Harper, 29 Mo. 301; Pitts v. Pitts, 52 N. Y. 593; Reynolds v. Reynolds, 4 Abb.

<sup>10</sup> Ante, § 285.

take a delinquent wife to his bed unless he had forgiven her.<sup>1</sup> And this knowledge consists of the two elements of the existence of the offence and a —

§ 291. **Belief of Guilt.** — “The true import of the rule,” said Parsons, C. J., “is that the cohabitation of the husband” is a conclusive remission of the wife’s offence, only if it transpires “after he believes it, on probable evidence. For he cannot be considered as having impliedly forgiven a crime which he does not believe to have been committed. And without that belief he cannot have knowledge of the crime; for he may have received the information without giving it credit.”<sup>2</sup> Thus, —

§ 292. **Instances.** — A husband, sued for the maintenance of his wife living apart from him, set up in defence her adultery. The jury found against him. Then he expressed himself satisfied of her innocence, and took her back to cohabitation. Afterward he was held not to be barred of his divorce for the same adultery, on becoming able to make proof of it. Said Lord Penzance: “In order to establish condonation, . . . it is necessary to prove that the husband took his wife back with the intention of forgiving her, believing her to be guilty. If the evidence leads the court to the conclusion that the husband did not thoroughly believe that his wife had been guilty, and therefore did not forgive her when he took her back, condonation is not established. It is very difficult to trace the movements of the petitioner’s mind as first one and then another piece of evidence as to his wife’s conduct was

Ap. 35; *Stevens v. Stevens*, 1 McCarter, 374; *Holbrook v. Her Husband*, 18 La. An. 643; *Ex parte Aldridge*, 1 Swab. & T. 88; *Rogers v. Rogers*, 122 Mass. 423. In *Evans v. Evans*, 7 Jur. 1046, where the bringing of a suit for the restitution of conjugal rights and a cohabitation following were adjudged to constitute condonation, Dr. Lushington seemed to regard the institution of the suit alone as sufficient. See ante, § 274–276. His words are: “If the treatment of a wife be such as to render the return to cohabitation unsafe, the commencing of a suit for the restitution of conjugal rights is a perfect condonation; for surely, if a husband has been guilty of conduct towards his wife endangering life and limb, it is rather an extraordinary mode of procuring redress to resort to a suit for restitution of

conjugal rights,—to return to the very person whose conduct has been the cause of the danger. I must say that such a measure does create a very strong presumption that the wife never could have considered her life in danger, when she voluntarily seeks a forced return to that state where she will be exposed to a repetition of such conduct, and that without protection.” s. p. query, *Neeld v. Neeld*, 4 Hag. Ec. 263, 268. But it should be remembered that the offence was cruelty, not adultery, and the bringing of the restitution suit showed that the party deemed cohabitation not unsafe. Vol. I. § 1531.

<sup>1</sup> *Beeby v. Beeby*, 1 Hag. Ec. 789, 3 Eng. Ec. 338, 340.

<sup>2</sup> *Anonymous*, 6 Mass. 147. And see *Dillon v. Dillon*, 3 Curt. Ec. 86, 117, 7 Eng. Ec. 377, 390.

communicated to him. . . . In a case of this kind the court ought to see its way very clearly to the fact of condonation before it comes to that conclusion.”<sup>1</sup> Yet where, on the other hand, after the conviction of a husband for the criminal offence of adultery, his wife with knowledge of it lodged two or three nights with him in prison, and there had sexual intercourse with him, she was denied divorce, although it was urged for her that she might not have believed him guilty.<sup>2</sup> Now, —

§ 293. **Sort of Belief.** — In reason, there can be no technical rule, like the one for cohabitation,<sup>3</sup> making adequate any mere belief in law, in distinction from belief in fact. To lay the foundation for an inference, the belief must be actual; nothing short of this, whatever cause for belief there may be, sufficing. Still, —

§ 294. **Evidence of Belief.** — As in other issues wherein a particular and actual state of the mind must be made to appear, circumstantial and presumptive evidence thereof is appropriate,<sup>4</sup> so likewise it is in this. Married persons, the same as single, are supposed to comprehend proofs. Therefore the doctrine of condonation is usually, but not with entire scientific accuracy, stated to be that cohabitation, after *probable knowledge* of the offence, is a presumptive remission of it.<sup>5</sup> This probable knowledge has been said to exist where information of facts has been given by credible persons, speaking of what they have seen; particularly if the party afterward produces the same witnesses on the trial of the cause, and by their testimony establishes the same facts.<sup>6</sup> Circumstances of mere suspicion are not adequate. Suspicion is not knowledge. It is not belief.<sup>7</sup> Beyond which, reason demands that something be conceded, — in some instances a great deal — to the special confidence which married parties commonly do and always should have in each other. Love is blind. And it often takes much to open and heal his eyes, so that he can see as others see. “Husbands,” said Malins, V. C., on one occasion, “are apt to believe what their wives tell them; and although this lady had

<sup>1</sup> *Ellis v. Ellis*, 4 Swab. & T. 154, 157.

<sup>2</sup> *Delliber v. Delliber*, 9 Conn. 233.

<sup>3</sup> *Ante*, § 285, 290.

<sup>4</sup> 1 Bishop Crim. Proced. § 1101.

<sup>5</sup> *Shelf. Mar. & Div.* 445; *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377, 389; *Best v. Best*, in the Arches Court, *Poynter Mar. & Div.* 234, 235, note; *Stevens v. Stevens*, 1 *McCarter*, 374;

*Maglathlin v. Maglathlin*, 138 Mass. 299.

<sup>6</sup> *Poynter Mar. & Div.* 232; *Marsh v. Marsh*, 2 *Beasley*, 281; *Dobbyn v. Dobbyn*, *Poynter Mar. & Div.* 233, note; *Pain v. Pain*, 37 *Mo. Ap.* 110.

<sup>7</sup> *Quincy v. Quincy*, 10 N. H. 272; *Kirkwall v. Kirkwall*, 2 *Hag. Con.* 277, 4 *Eng. Ec.* 541. And see *ante*, § 207.

been guilty of so much levity, yet when, in that sacred confidence which subsists between husband and wife, she assured him that she had not been guilty of adultery, he was entitled to believe her.”<sup>1</sup>

§ 295. **Bringing a Suit for Divorce** — is incontrovertible evidence that the plaintiff now believes the charge. Therefore cohabitation while it is pending is necessarily condonation, and a bar to the relief prayed.<sup>2</sup>

§ 296. **Neglect to Inquire** — (**Connivance blending**). — There are cases in which a husband has been denied divorce for the wife's adultery, not necessarily on the one distinct ground of condonation, while his knowledge of her misconduct was no more than sufficient to excite vigilance and inquiry. Where, for example, one with intimations and some evidence neither made investigations nor endeavored to prevent a repetition, but continued the cohabitation till his wife left him and brought her separation suit for his alleged cruelty; and he, in the first instance, set up her adultery in defence merely, not praying for divorce till a later stage of the proceeding; and the circumstances throughout showed him to have been willingly blind to her failings, and anxious to retain her whether guilty or not, — the court denied his prayer though his charge of adultery was proved, and hers of cruelty was not proved.<sup>3</sup> But plainly these facts disclosed more of connivance than of condonation; or, at all events, here was a compound, not unusual in the former English cases where the judge passed on the facts and law together, of the two elements of condonation and connivance. Dr. Lushington once said: “The truth is, and much of the obscurity arises from the fact, that in the various discussions on this subject the line of distinction between condonation and other conduct which would equally bar a remedy has not been, and I might perhaps say could not be, perfectly observed. Thus it is that condonation has been mixed up with that which, though it works the same effect, is totally dissimilar in its nature. Both husband and wife may so repeatedly forgive<sup>4</sup> adultery that the remedy is forfeited, the party showing an in-

<sup>1</sup> *Brown v. Brown*, Law Rep. 7 Eq. 185, 193.

<sup>2</sup> 1 *Fras. Dom. Rel.* 668; *Marsh v. Marsh*, 2 *Beasley*, 281; *Harper v. Harper*, 29 *Mo.* 301; *Holbrook v. Her Husband*, 18 *La. An.* 643.

<sup>3</sup> *Best v. Best*, 1 *Add. Ec.* 411, 2 *Eng. Ec.* 158; s. c. in the *Archers Court*, *Poynter Mar. & Div.* 234, note.

<sup>4</sup> *Ante*, § 238.

sensibility to the injury.”<sup>1</sup> Of the like sort is insincerity, to be considered in a subsequent chapter.<sup>2</sup>

§ 297. **Further of Indifference — (Investigation on Suspicion).** — In another case, Dr. Lushington, debating the admissibility of a wife’s allegation responsive to her husband’s libel, observed: “Although Dr. Dillon pleads that he did not believe the information that his wife had slept on the night of the 29th of December with a strange man at the inn at Gadshill, he acts as if he did credit it, and he continues to cohabit with her on the very night of the day on which he receives the information. Now I have always understood the legal principle to be this: that when a husband has received information respecting his wife’s guilt, and can place such reliance on the truth of it as to act on it, although he is not bound to remove his wife out of his house, he ought to cease marital cohabitation with her.” But on the final hearing the learned judge did not deem this objection conclusive against him, yet on other grounds gave judgment for the wife.<sup>3</sup> If the friend of an injured wife makes an investigation concerning a rumored adultery by the husband, and thereupon tells her there is no cause of suspicion, whereupon she is reconciled to him, she will be presumed to be ignorant of the adultery, and so there will be no condonation.<sup>4</sup> Again, —

§ 298. **Ability to make Proofs — (Necessity).** — If a husband is convinced of his wife’s adultery, but is unable to prove it, he is under such a necessity to continue the cohabitation<sup>5</sup> that it will not constitute condonation.<sup>6</sup> Not all the authorities are quite distinct to this proposition, and even some appear adverse.<sup>7</sup> But

<sup>1</sup> *Snow v. Snow*, 2 Notes Cas. Supp. 1, 14. See *Crewe v. Crewe*, 3 Hag. Ec. 123, 132, 5 Eng. Ec. 45, 49; ante, § 238, 240–242.

<sup>2</sup> Post, c. 12.

<sup>3</sup> *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377, 379, 389, 390.

<sup>4</sup> *Bramwell v. Bramwell*, 3 Hag. Ec. 618, 5 Eng. Ec. 232, 240.

<sup>5</sup> Ante, § 277, 278.

<sup>6</sup> *Quincy v. Quincy*, 10 N. H. 272, 274; *Uhlmann v. Uhlmann*, 17 Abb. N. Cas. 236.

<sup>7</sup> An example of this is a mere **Private Confession**. — Thus, in *Hofmire v. Hofmire*, 7 Paige, 60, 32 Am. D. 611, Chancellor Walworth seems to be of the

opinion that a wife’s cohabitation with her husband, after he has confessed to her adultery which she cannot prove, will not bar her of divorce when afterward she obtains the proofs. “His private admission of the fact to her,” observed this learned judge, “was not sufficient to authorize her to take any proceeding against him, or even to protect her friends for harboring her against his will, if she had then abandoned his bed and board.” In *D’Aguilar v. D’Aguilar*, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 337, Lord Stowell said: “It is not shown she knew it so that she could legally prove it. If it was shown that he had avowed it to her, it might be a condonation as to that particular fact.”

throughout our jurisprudence, an excusing necessity need not be absolute and physical; a practical, moral one will suffice.<sup>1</sup> And should a husband turn off his wife on a charge which he could not judicially prove, however well he might know it himself, he would subject himself to pay for necessities which any person might furnish her, to her divorce suit for desertion or even in some circumstances for cruelty,<sup>2</sup> and to the reproaches of the community in which he dwells for having inflicted the heaviest injury on one whom he is supposed to be under the highest obligation to protect. To infer forgiveness from his unwillingness to encounter these extreme perils for the sole purpose of becoming a matrimonial martyr, without the smallest prospect of accomplishing thereby any useful end, would, as a principle of law, be unjust, and, as a probability of fact, at variance with the ordinary workings of human nature. Cohabitation in such circumstances would be a necessity within the rules of every department of our law. "A husband," says Lord Stowell, "has suspicions; he has some intimations; he has enough to convince his own mind, but not to instruct a legal case. In that distressing interval his conduct is nice; and it is difficult to refrain from cohabitation, as the means of discovery would be frustrated; and if he continues cohabitation, it then becomes liable to that species of imputation which has passed to the disadvantage of this gentleman,"<sup>3</sup> — "observations," says Dr. Lushington, which apply "to a case where there is no direct evidence of the fact, although there are circumstances rendering the fact probable." Therefore in such circumstances the husband is not barred by continuing to cohabit with the wife.<sup>4</sup> But where his ability to produce the proof is commensurate with his knowledge, there is little scope for this distinction.

In *Timmings v. Timmings*, 3 Hag. Ec. 76, 5 Eng. Ec. 22, 23, the same judge observes: "Although by the rules of law a confession does not satisfy the mind of the judge, it must satisfy the mind of the husband, particularly when direct and unequivocal, as in the present instance. And what is his behavior upon it? His mother, in an interrogatory, says 'he wished his wife to go from him; but on the intercession of friends, he consented to live with her.' This, then, is a direct condonation." But in the facts of this

case, by which the judicial words are to be interpreted, Vol. I. § 111, the confession was not private, so the husband had proof of it.

<sup>1</sup> 1 Bishop Crim. Law, § 350-355; 2 Ib. § 959, 960; Bishop Con. § 359, 583, 921, 1067; Bishop Non-Con. Law, § 159, 160, 163, 822, 869, 872.

<sup>2</sup> Vol. I. § 1589, 1614.

<sup>3</sup> *Elwes v. Elwes*, 1 Hag. Con. 269, 292, 4 Eng. Ec. 401, 412.

<sup>4</sup> *Dillon v. Dillon*, 3 Curt. Ec. 86, 113, 7 Eng. Ec. 377, 389.

§ 299. **Knowledge of Part only — (Connivance).** — In cases not within the doctrine of inferring connivance from too ready condonation,<sup>1</sup> the forgiveness of one act does not bar divorce for another.<sup>2</sup> And a general condonation by cohabitation extends simply to what the condoning party knew.<sup>3</sup> We have even an intimation, not sustained by the other authorities, that an implied condonation by one knowing only a part does not so much as cover the part.<sup>4</sup> Therefore to render, for example, a condonation of adultery a complete bar, the condoning party must be aware of its full extent. For one might well consent to pardon a single dereliction committed under mitigating circumstances, yet not more, much less a series of offences.<sup>5</sup> There is no pretence that a condonation operates on subsequent wrongs to license them.<sup>6</sup>

§ 300. **Insanity** — takes away both the knowledge and will to condone. But returning reason restores them, and they may be exercised in favor of adultery committed during the insane period.<sup>7</sup>

### III. *Specially of the Condonation of Cruelty.*

§ 301. **Principle Universal, Varying Applications.** — The principle of condonation is universal in our divorce law, but the differing natures of offences create a mere seeming difference in its application. The foregoing expositions refer primarily, yet not exclusively, to adultery, which commonly consists of a single proven act of secret wrong, — being therein unlike cruelty, which is known as fast as it occurs and ordinarily faster than it can be proved, and in most instances consists of a series of aggressions extending through a long period of time.<sup>8</sup> Still, —

§ 302. **Applicable in Cruelty.** — Subject to necessary modifications, which are rather apparent than real, condonation, by the nearly universal doctrine, is the same bar in cruelty as in adultery.<sup>9</sup>

<sup>1</sup> Ante, § 238, 296. And see *Rogers v. Rogers*, 122 Mass. 423.

<sup>2</sup> *Ralston v. Ralston*, 8 Scotch Sess. Cas. 4th ser. 371.

<sup>3</sup> *Alexandre v. Alexandre*, Law Rep. 2 P. & M. 164.

<sup>4</sup> *Dempster v. Dempster*, 2 Swab. & T. 438.

<sup>5</sup> *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 337; *Durant v. Durant*, 1 Hag. Ec. 733, 3 Eng. Ec. 310; *Turton v. Turton*, 3 Hag. Ec. 338, 5 Eng.

Ec. 130, 136; *Bramwell v. Bramwell*, 3 Hag. Ec. 618, 5 Eng. Ec. 232, 238; *Odom v. Odom*, 36 Ga. 286. **Crim. Con.** — How in criminal conversation, *Clouser v. Clapper*, 59 Ind. 548. And see *Verholf v. Van Houwenlengen*, 21 Iowa, 429.

<sup>6</sup> *Cumming v. Cumming*, 135 Mass. 386, 46 Am. R. 476.

<sup>7</sup> *Parnell v. Parnell*, 2 Phillim. 158, 160, 1 Eng. Ec. 220, 222.

<sup>8</sup> And see *Doe v. Doe*, 52 Hun, 405.

<sup>9</sup> *Burr v. Burr*, 10 Paige, 20; *Whispell*

§ 303. **Whether Exceptional Doctrine.**—There are some cases, particularly in Massachusetts<sup>1</sup> and Pennsylvania,<sup>2</sup> wherein it is apparently laid down that the presumption of condonation from cohabitation is inapplicable, against the wife, to cruelty. This exception, unknown in England, is not generally allowed in the United States. Even in Massachusetts later decisions expressly assert the applicability of the doctrine to cruelty,—thus overruling, if it were necessary, the former adjudication.<sup>3</sup> And in Pennsylvania the adverse holding is derived largely or mainly from the special terms of a statute.

§ 304. **In Scotland,**—condonation of adultery is not, as in England and our States, conditional; it is absolute remission.<sup>4</sup> Therefore of necessity, in the language of Lord Young, it “stands on quite another ground. Cruelty is cumulative, admitting of degrees and augmenting by addition; so that it may be condoned and even forgiven for a time, and up to a certain point, without any bar in sense or reason to bringing it all forward when the continuance of it has rendered it no longer condonable.”<sup>5</sup> Consequently a doctrine similar to the English and American is applied to it.<sup>6</sup> “When,” said the Lord President in another Scotch case,

*v. Whispell*, 4 Barb. 217; *Barnes v. Barnes*, Wright, 475; *Questel v. Questel*, Wright, 491; *McDwire v. McDwire*, Wright, 354; *Threewits v. Threewits*, 4 Des. 560; *Masten v. Masten*, 15 N. H. 159, 160; *Wright v. Wright*, 3 Tex. 168, 187; *Sullivan v. Sullivan*, 34 Ind. 368; *Wilson v. Wilson*, 16 R. I. 92; *Sharp v. Sharp*, 116 Ill. 509 (compare with *Phillips v. Phillips*, 1 Bradw. 245, and *Farnham v. Farnham*, 73 Ill. 497); *Rayner v. Rayner*, 49 Mich. 600.

<sup>1</sup> *Perkins v. Perkins*, 6 Mass. 69.

<sup>2</sup> *Hollister v. Hollister*, 6 Pa. 449. See *Tiffin v. Tiffin*, 2 Binn. 202; *McKarracher v. McKarracher*, 3 Yeates, 56.

<sup>3</sup> *Gardner v. Gardner*, 2 Gray, 434, 441; *Robbins v. Robbins*, 100 Mass. 150, 97 Am. D. 91.

<sup>4</sup> 1 Fras. Dom. Rel. 668; *Collins v. Collins*, 10 Scotch Sess. Cas. 4th ser. 250, 11 Scotch Sess. Cas. 4th ser. H. L. 19, 9 Ap. Cas. 205.

<sup>5</sup> *Collins v. Collins*, supra, at p. 262 of 10 Scotch Sess. Cas. 4th ser., quoted 9 Ap. Cas. 242.

<sup>6</sup> In the Scotch case of *Scott v. Camp-*

bell, the commissaries sustained the following view, as a sufficient answer to the plea of condonation founded on cohabitation: “Separation from bed and board, upon the head of maltreatment, was for the most part founded on the multiplicity and renewing the acts of maltreatment, and therefore the continuing of cohabitation was never a good defence against this separation. For one act or two might not be sufficient, and yet a complication was, because it demonstrated a continuance of the malevolent mind, and therefore these acts of maltreatment were always conjoined, though there be an interim cohabitation in hopes of amendment. And if it were not so, there could be almost no separations on the head of maltreatment; for the acts consisting in a tract, it necessarily supposed an interim cohabitation, and was very different from the case of divorce on the head of adultery; because there one act is *violatio fidei conjugalis*, and therefore cohabitation after knowledge thereof was understood to be a tacit remission; which was very different from maltreatment.” 1 Fras. Dom. Rel.



“a wife comes into court to complain that she cannot live with her husband because of acts of violence to her, and of a course of conduct that has placed her life or health in danger, she thereby opens up an inquiry into the whole history of her married life. Although acts of violence committed at an earlier period, and which have not prevented her from living with him, or going back to him after they have been separated, cannot be made the sole foundation of an action of separation, they may form the subject of investigation and proof with a view to determine what is the true issue of the case; namely, whether the wife can with safety to person and health live with him now. Because not only do they afford an indication of what the man’s temper and habits are, but they also show what may be the result of still continuing to live with him if there have been acts of recent occurrence, although these may not be of the same aggravated type.”<sup>1</sup> In the words of Lord Jeffrey in another case, “the last drop makes the cup of bitterness overflow.”<sup>2</sup> Now, —

§ 305. **With us, in Reason — Authority.** — As to cruelty, these Scotch views are applicable equally in our own law, and in accord with them are the English and American cases, though there may be differences in mere forms of stating them.<sup>3</sup> Cruelty, said Sir John Nicholl, consists of “successive acts of ill-treatment, at least, if not of personal injury; so that something of a condonation of earlier ill-treatment must in such cases necessarily take place.”<sup>4</sup> But we have seen that cohabitation from necessity never works a condonation.<sup>5</sup> For which and other reasons, —

§ 306. **Cohabitation after last Act.** — A wife’s cohabitation with her husband, after he inflicted the last act of cruelty of which she complains, will not necessarily, in all circumstances, bar her suit.<sup>6</sup> And particularly, —

§ 307. **Wife’s Conduct.** — Until the wife has determined to leave her husband and cast herself on her legal rights, she should

462; *Macfarlane v. Macfarlane*, 11 Scotch Sess. Cas. 2d ser. 533.

<sup>1</sup> *Graham v. Graham*, 5 Scotch Sess. Cas. 4th ser. 1093, 1095.

<sup>2</sup> *Macfarlane v. Macfarlane*, *supra*.

<sup>3</sup> *Snow v. Snow*, 2 Notes Cas. Supp. 1, 15.

<sup>4</sup> *Westmeath v. Westmeath*, 2 Hag. Ec. Supp. 1, 113, 4 Eng. Ec. 238, 290.

<sup>5</sup> *Ante*, § 277, 278, 298.

<sup>6</sup> *Cooke v. Cooke*, 3 Swab. & T. 126, 135; *Reynolds v. Reynolds*, 4 Abb. Ap. 35; *Phillips v. Phillips*, 1 Bradw. 245; *Gholston v. Gholston*, 31 Ga. 625; *Mack v. Handy*, 39 La. An. 491; *Terrell v. Boarmen*, 34 La. An. 301; *Sharp v. Sharp*, 116 Ill. 509; *Wilson v. Wilson*, 16 R. I. 92. See *N. v. N.* 3 Swab. & T. 234.

endeavor to reclaim him. Therefore Lord Stowell laid down,<sup>1</sup> what Dr. Lushington confirmed,<sup>2</sup> that patient endurance of ill-treatment not only is no bar to a wife's suit, but raises no presumption against the truth of her complaint. And we have similar American utterances.<sup>3</sup> So that it depends on the particular circumstances whether or not, in a cruelty case, connubial intercourse will bar the wife. Where the cruelty was in a foreign country, and the wife continued her usual cohabitation for several days after the last act was inflicted, her remedy was held not to be lost.<sup>4</sup> We have even intimations that if one who has thus suffered at home from her husband, leaves her native country with him and her children, for the purpose of avoiding a separation from the latter, and preventing their being left unprotected and alone in the hands of a cruel father, this continued cohabitation will not be a condonation.<sup>5</sup> There is an Alabama case going the extreme length of holding that a wife, complaining of a gross act of cruelty, was not barred though she had continued the cohabitation two years;<sup>6</sup> but evidently the circumstances must be peculiar to bring such a case within the general doctrine as held elsewhere.<sup>7</sup>

#### IV. *The Condition in Condonation.*

§ 308. **Defined.**—All condonation, especially the implied, is upon the condition both that the offence shall not be repeated,<sup>8</sup> and likewise that continually afterward the party forgiven shall treat the other with conjugal kindness; whereupon a breach of the condition revives the original right of divorce.<sup>9</sup>

<sup>1</sup> D'Aguilar v. D'Aguilar, 1 Hag. Ec. 773, 781, 3 Eng. Ec. 329.

<sup>2</sup> Snow v. Snow, 2 Notes Cas. 1, 16.

<sup>3</sup> Terrell v. Boarman, 34 La. An. 301; Mack v. Handy, 39 La. An. 491.

<sup>4</sup> Snow v. Snow, *supra*; s. p. in Popkin v. Popkin, 1 Hag. Ec. 765, where, under different circumstances, a cohabitation which continued from early in December to the 6th of January was held not to bar the wife; s. p. also, Dysart v. Dysart, 1 Rob. Ec. 106, 139, 541; Whispell v. Whispell, 4 Barb. 217. Some of the cases cited to the last section are similar.

<sup>5</sup> Curtis v. Curtis, 1 Swab. & T. 192, 200.

<sup>6</sup> Reese v. Reese, 23 Ala. 785.

<sup>7</sup> See Bowic v. Bowic, 3 Md. Ch. 51; Gardner v. Gardner, 2 Gray, 434.

<sup>8</sup> Wilson v. Wilson, 6 Moore P. C. 484; Wagner v. Wagner, 6 Mo. Ap. 573; Suggate v. Suggate, 1 Swab. & T. 492; Sharp v. Sharp, 116 Ill. 509; Eggerth v. Eggerth, 15 Or. 626; Guthrie v. Guthrie, 26 Mo. Ap. 566.

<sup>9</sup> Ante, § 269; Davis v. Davis, 19 Ill. 334; Turner v. Turner, 44 Ala. 437; Ozmore v. Ozmore, 41 Ga. 46; Farnham v. Farnham, 73 Ill. 497; Sullivan v. Sullivan, 34 Ind. 368; Phillips v. Phillips, 27 Wis. 252; Sewall v. Sewall, 122 Mass. 156, 23 Am. R. 299; Cooke v. Cooke, 3 Swab. & T. 246, 247; Warner v. Warner, 4 Stew. Ch. 225, Williams v. Williams, 23 Fla.

§ 309. **Why?** — Though in some degree this doctrine is technical, there are plainly for it various reasons. One is that the condoning party almost certainly proceeded on assurances from the other, or on a belief otherwise induced, of repentance. Then if the latter's conduct shows that the repentance was either feigned or ineffectual, the condonation was a result of fraud or mistake, — two impediments either of which, on well recognized principles of law,<sup>1</sup> invalidates every undertaking.<sup>2</sup> So likewise is the law of executive pardon; a pardon procured by fraud is void, and any suppression of material facts is deemed a fraud.<sup>3</sup> Another reason is that the law, like Him from whom it primarily proceeds, loves contrition and reformation, and hates hypocrisy and deceit. And the conditional condonation, whereby one may safely forgive, being remitted to his original rights if the apparent repentance turns out to have been false, is the law's expression of this its combined love and hate. But for this doctrine, a husband seeing the tears of a delinquent wife, and not knowing whether the sorrow which produced them was for her sin or for its discovery, would be compelled in self-protection to refer it to the latter, and withhold forgiveness though in truth there was repentance, to the overthrow of the high policy of the law.

§ 310. **Objected to** — (**Scotch Law — Not thought of**). — We have seen that in the Scotch law condonation of adultery, yet not of cruelty, is absolute and without condition.<sup>4</sup> Thereupon some English judges, in a Scotch appeal case in the House of Lords, expressed the opinion that just principle forbade any condition to condonation of adultery; because, so they deemed (herein committing a grave oversight),<sup>5</sup> it created for the particular case an anomalous status of marriage, wherein dissolution was permitted for a cause in other cases inadequate.<sup>6</sup> In the words of Lord Blackburn, "I do not see how it could be consistent with the relation of married persons that there should be a power to divorce for any other cause but that one which the law allows; namely, adultery."<sup>7</sup> The thing not thought of was that, in this case the same as in others, the divorce is permitted only for the

324; *Blandford v. Blandford*, 8 P. D. 19; *Rose v. Rose*, 87 Ind. 481; *Lassiter v. Lassiter*, 92 N. C. 129.

<sup>1</sup> Bishop Con. § 641-643, 693, 695, &c.

<sup>2</sup> *Armstrong v. Armstrong*, 27 Ind. 186, 189; *Farnham v. Farnham*, 73 Ill. 497.

<sup>3</sup> 1 Bishop Crim. Law, § 905, 906.

<sup>4</sup> Ante, § 304.

<sup>5</sup> Ante, § 28.

<sup>6</sup> *Collins v. Collins*, 9 Ap. Cas. 205, 233-235, 258, 259.

<sup>7</sup> *Ib.* at p. 235.

adultery, not in any degree for the unkindness which takes away the effect of the condonation. A husband who has cohabited any number of years with a wife subsequently to her committing adultery may, if he did not know of it while all the rest of the world did, have his divorce for it. To repeat, her adultery, not his enlightenment, would be the ground for the divorce. His mistake in supposing her to have led a pure life creates as apt a semblance of a special status in the parties as if the mistake had consisted in believing her to have repented when she had not. If, after forgiving her through the latter mistake, his mind becomes enlightened by intelligence of a breach of the condition on which the forgiveness proceeded, whereupon he seeks a divorce for the adultery, his position is no more anomalous than the newly enlightened husband's, who had long been cohabiting with a wife guilty in fact, and known to be so by the rest of mankind.

§ 311. **The Terms or Limits of the Condition**, — as stated in our defining,<sup>1</sup> are those deemed most in accord with combined reason and adjudication. But there have been some doubts, and perhaps some may still remain. Thus, —

§ 312. **To revive Condoned Adultery**. — In England, as late as 1825, it was in *Durant v. Durant* debated before Sir John Nicholl, as unsettled, whether or not ill-treatment less than legal cruelty — in this instance, it was making a false accusation of adultery against the wife and turning her off — would revive condoned adultery. It was “admitted; first, that condonation is accompanied with an implied condition; secondly, that the condition implied is that the injury shall not be repeated; thirdly, that a repetition, at least of the same injury, does away the condonation and revives the former injury.” And the further question was, “Must the injury be of the same sort, be proved in the same clear manner, be sufficient *per se* to found a separation?” Upon which he observed that “if nothing but clear proof of actual adultery will do away condonation of adultery, the rule of revival becomes nearly useless; for the revival is unnecessary.” Solicitations of chastity, without more, had been in effect held to revive condoned adultery;<sup>2</sup> and as far back as 1730 at least, cruelty was clearly adjudged to revive it,<sup>3</sup> even though insufficient in intensity

<sup>1</sup> Ante, § 308.

<sup>2</sup> *Worsley v. Worsley*, 2 Lee, 572, cited

<sup>3</sup> See *Snow v. Snow*, 2 Notes Cas. Supp. 1 Hag. Ec. 734, 762, 764, 3 Eng. Ec. 311, 1, 14.

to found an original suit,—thus covering the whole ground by actual adjudication.<sup>1</sup> And it is material for the American lawyer to observe that this exposition by the learned judge traces the doctrine back to a period much antedating our Revolution.

§ 313. **Subsequently**—the same learned judge reaffirmed this case of *Durant v. Durant*, and without hesitation or qualification defined the condition in condonation to be that the suffering party shall thereafter be treated with conjugal kindness.<sup>2</sup> Dr. Lushington bowed to it as authority not to be questioned, at the same time paying it the tribute of his own opinion as being “most consonant to justice.”<sup>3</sup> Such, therefore, may be deemed the established English doctrine,<sup>4</sup> though the cases since the divorce jurisdiction passed from the ecclesiastical courts are not so distinct and exact to it as one would expect to find them.<sup>5</sup> Now, —

§ 314. **Dissolution distinguished from Bed and Board—Statute.**—At the time when the foregoing doctrine was established in England, dissolutions for causes subsequent to the marriage were there unknown. And when, in 1857, the Divorce Act first per-

324. And see *Eldred v. Eldred*, 2 Curt. Ec. 376, 7 Eng. Ec. 144, 148.

<sup>1</sup> *Durant v. Durant*, 1 Hag. Ec. 733, 761, 3 Eng. Ec. 310, 323; *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773, 3 Eng. Ec. 329.

<sup>2</sup> *Westmeath v. Westmeath*, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238, 290.

<sup>3</sup> *Bramwell v. Bramwell*, 3 Hag. Ec. 618.

<sup>4</sup> It is so laid down in Waddilove's Digest, p. 44, referring to *Durant v. Durant*, 1 Hag. Ec. 745, 761; *Ferrers v. Ferrers*, 1 Hag. Con. 130; *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 781; *Snow v. Snow*, 2 Notes Cas. Supp. 1, 10. **Like Nature.**—But in the Ecclesiastical Court, a little while before the transfer of its divorce jurisdiction to the new court, and while desertion was not a ground for judicial interposition except by the suit for the restitution of conjugal rights, it was held that cruelty condoned is not revived by subsequent desertion. Conduct to so operate, it was said, must be *ejusdem generis*. *Hart v. Hart*, 2 Spinks, 193. Requiring it to be *ejusdem generis* is not consistent with the established doctrine that cruelty, and in a

less degree than will justify a separation, revives condoned adultery; for surely harsh language and a threatening aspect are not *ejusdem generis* with adultery. Our own Chancellor Walworth stated the English doctrine to be “that to revive condoned adultery, it was not necessary that the new injury should be of the same nature; but that cruelty, desertion, or other improper conduct of the husband towards the wife was sufficient.” *Johnson v. Johnson*, 4 Paige, 460, 470. Of the same opinion, as to the English doctrine, were the Vice-Chancellor, and as far as appeared, all the members of the Court of Errors, in this case. 1 Edw. Ch. 439, 14 Wend. 637; *s. r.* *Burr v. Burr*, 10 Paige, 20, 34; *Whispell v. Whispell*, 4 Barb. 217; *Quincy v. Quincy*, 10 N. H. 272; *Phillips v. Phillips*, 4 Blackf. 131, note; *Langdon v. Langdon*, 25 Vt. 678, 60 Am. D. 296; 2 Greenl. Ev. § 53; 2 Kent Com. 101, note.

<sup>5</sup> *Dent v. Dent*, 4 Swab. & T. 105; *Cooke v. Cooke*, 2 Swab. & T. 126, 137, 246, 247; *Winscom v. Winscom*, 3 Swab. & T. 380; *Newsome v. Newsome*, Law Rep. 2 P. & M. 306.

mitted judicial dissolution, it distinguished “judicial separation,” which was the statutory term for bed and board, from the “dissolution of a marriage.” As to the former it provides that, subject to any modifications created by the statute, the “court shall proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief.”<sup>1</sup> As to the latter, it ordains, among other things, that if the petitioner “has condoned the adultery complained of . . . the court shall dismiss the said petition.”<sup>2</sup> In matter of interpretation, though the meaning of a statute is to be determined on a comparison of its terms with those of the prior law,<sup>3</sup> there is in reason no scope here for this rule; for it is just as true after a defendant has violated the condition of a condonation as it was before, that the plaintiff “*has condoned the adultery.*” And this conclusion is confirmed by the statute’s careful discrimination between “separation” and “dissolution,” indicating the legislative intent that the two sorts of case shall be governed by different rules. Still further, and of late, has this conclusion been confirmed by distinct intimations of opinion from the judges of ultimate appeal in the House of Lords, — in the way only of *dictum*, of course, since it was upon the hearing of a Scotch appeal, — that upon principle the cases are different, and the condition in condonation should not be recognized in dissolution suits.<sup>4</sup> So that if nothing else had fallen from the courts, we should be fully justified in deeming the condition not to attach to the condonation of adultery when relied on for dissolution. But —

§ 315. **Adverse Holding.** — In 1865, long before this view on principle was promulgated in the House of Lords, the very point was made before the judge ordinary. Counsel referred only to the one section of the statute, and omitted to direct the court’s attention to the careful distinction which the entire enactment presented between separation and dissolution. Whereupon the judge said that the “point” was “taken very clearly and ingeniously,” but he held that “condonation” in the statute bore the

<sup>1</sup> Stat. 20 & 21 Vict. c. 85, § 22.

<sup>4</sup> Collins v. Collins, 9 Ap. Cas. 205.

<sup>2</sup> Ib. § 30.

Further as to which case, see ante, § 304,

<sup>3</sup> Bishop Written Laws, § 5-7, 82, 86, 309.  
88, 131-144.

meaning it had received in the unwritten law, and when the condition was violated the case stood as though there had been no condonation,<sup>1</sup>—a reasoning which would have been more satisfactory if the whole statute had disclosed the legislative intent to be to treat the separation and dissolution alike, than it now appears in the light of the contrast which it so carefully displays. In subsequent dissolution cases before the working court, involving in their facts this question, there was no reference to it, and the conditional quality of the condonation was silently recognized, the same as in suits for separation.<sup>2</sup> Therefore, the matter not having been definitively adjudged in the House of Lords, one cannot say how it really stands in the English law. Still,—

§ 316. **With us, and as between Partial and Full Divorce.**—The English law, as it stood when it became our own, attached to condonation, we have clearly seen, the condition stated in our defining.<sup>3</sup> But it was necessarily silent as to whether or not its application would extend to the suit, then unknown, for the dissolution of the marriage. Later, the English working court, in spite of the statute which might create a difference, has constantly administered the law of condonation as carrying the same condition, which had been established in separation suits, into those for dissolution.<sup>4</sup> The reasons for the doctrine, as stated at the opening of this sub-title, cover equally the two classes of cases.<sup>5</sup> And the common course of our courts is to proceed under the same forms of practice for the two forms of divorce. So that no sound reason for a distinction is discoverable. And—

§ 317. **In American Authority,**—the English doctrine, including (in the absence of a statute) its equal application in the two kinds of divorce, is fully sustained. For example, the question arose early in the State of New York, where adultery authorizes a dissolution, and cruelty a separation from bed and board. A husband, on the wife's bill for adultery, set up in defence and proved her condonation of it. To take away the effect of which condonation, it was shown on behalf of the wife that, though there had been no subsequent adultery or even actual violence,

<sup>1</sup> *Dent v. Dent*, 4 Swab. & T. 105.

<sup>2</sup> For example, *Rose v. Rose*, 7 P. D. 225, 8 P. D. 98; *Pomero v. Pomero*, 10 P. D. 174; *Stoker v. Stoker*, 14 P. D. 60; *Story v. Story*, 12 P. D. 196; *McCord v. McCord*, Law Rep. 3 P. & M. 237; New-

some *v. Newsome*, Law Rep. 2 P. & M. 306.

<sup>3</sup> Ante, § 308.

<sup>4</sup> Cases cited ante, § 313.

<sup>5</sup> Ante, § 309.

the husband had totally neglected to attend to her comfort, had insulted her with opprobrious epithets and offensive language, and had otherwise pursued toward her a course of conduct calculated to wound her feelings and alienate her affections. Vice-Chancellor McCoun held that the condoned adultery was thereby revived; Chancellor Walworth, on appeal, reversed this decision; the Court of Errors, on further appeal, reversed the decision of the Chancellor, confirming that of the Vice-Chancellor.<sup>1</sup> Afterward, in the same State, a wife forgave her husband's adultery, then he committed a felony for which he was sentenced to prison, and Vice-Chancellor McCoun, confirmed on appeal by Chancellor Walworth, held that the adultery was revived.<sup>2</sup> And other judicial opinion in this country is believed to be nearly or quite unanimous in accord with this New York doctrine, though not in all the cases are the facts broad enough to cover the entire ground.<sup>3</sup> And —

§ 318. **Mingled.** — It often happens that the facts of a case present the question of conditional condonation mingled with some other question of law or evidence. Thus, —

§ 319. **Acts of Like Nature — Cruelty.** — In cruelty, for example, the effect of resumed ill conduct after a condonation is increased in significance by the nature of the offence.<sup>4</sup> To illustrate, words “receive a different interpretation,” said Lord Stowell, if “the party was in the habit of following up words with blows; and on

<sup>1</sup> *Johnson v. Johnson*, in the V. C. Court, 1 Edw. Ch. 439; in the Ch. Court, 4 Paige, 460; in the Court of Errors, 14 Wend. 637; *Lockwood Reversed Cases*, 141. The opinion of the Court of Errors was delivered by Chief-Justice Savage, and concurred in by Mr. Justice Nelson, and Senators Armstrong, Beckwith, Bishop, Cropsey, Griffin, Kemble, Lacey, MacDonald, and Willes. Senator Tracey gave a dissenting opinion, in which he was sustained by Senators Downing, Edmonds, Edwards, Fisk, Lansing, Mack, Maison, and Van Schaick. When the court came to settle the decree, Senator Kemble stated the ground of his vote to be that he did not regard the condonation as sufficiently proved; so he had not considered the question of revival. The reporter, in a note, since confirmed by Chancellor Walworth (*Burr v. Burr*, 10

*Paige*, 20, 35; but see *Whispell v. Whispell*, 4 Barb. 217), drew the inference from this fact that the question was still open in New York; but why, it does not appear, since, throwing out the vote of Kemble, for it could not be counted the other way, there would be left ten to nine. And Mr. Lockwood, in his *Reversed Cases*, p. 145, says: “We believe the profession consider the question very well settled by the opinion of Chief-Justice Savage.”

<sup>2</sup> *Hoffmire v. Hoffmire*, 3 Edw. Ch. 173; *Hofmire v. Hofmire*, 7 Paige, 60, 32 Am. D. 611.

<sup>3</sup> Cases cited ante, § 308, 312; *Odom v. Odom*, 36 Ga. 286; *Warner v. Warner*, 4 Stew. Ch. 225; *Gardner v. Gardner*, 2 Gray, 434, 442; *Nogees v. Nogees*, 7 Tex. 538, 58 Am. D. 78; *Wright v. Wright*, 6 Tex. 3, 21.

<sup>4</sup> Ante, § 301–307, 310.



these grounds I am of opinion much less is sufficient to destroy condonation than to found an original suit.”<sup>1</sup> So also, the condonation having its probable origin in a presumed change of temper, acts short of original cruelty may show that no change did take place, and while not alone sufficient evidence of danger to the injured party, may make the danger apparent when connected with what went before.<sup>2</sup> A woman complaining of her husband’s cruelty “has a right to judge of the future by the past; and the court will connect the whole of his conduct, in order to form a correct judgment.”<sup>3</sup> So likewise,—

§ 320. **Acts of Like Nature in Adultery.**—In a Scotch case already referred to,<sup>4</sup> ultimately disposed of in the House of Lords, wherein it was decided that condonation of adultery is in Scotland absolute and without condition, a husband had condoned his wife’s adultery on her promise to have no more intercourse of any sort with the paramour. But in spite of the promise, of the husband’s remonstrance, and of his interposing such obstacles as he could, she clandestinely thrust herself into the paramour’s company, and probably was prevented from repeating her guilt only by a consciousness that she was watched.<sup>5</sup> Plainly, by our law, this conduct of hers would have obliterated the condonation and entitled the husband to a divorce. Even if she never meant to go further, it would under the circumstances have been a very base conjugal unkindness. In matter of evidence, if clear proof of opportunity had been added, no one would hesitate to draw the conclusion that a fresh adultery was committed. And the rule in such cases very properly is that the ante and post condonation facts may be connected, resulting in sufficient evidence, though what oc-

<sup>1</sup> *D’Aguilar v. D’Aguilar*, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 335. And see *Westmeath v. Westmeath*, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238, 290; *Durant v. Durant*, 1 Hag. Ec. 733, 3 Eng. Ec. 310, 327; *Whispell v. Whispell*, 4 Barb. 217; *Burr v. Burr*, 10 Paige, 20; *Langdon v. Langdon*, 25 Vt. 678, 60 Am. D. 296; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. D. 227; *Hughes v. Hughes*, 19 Ala. 307; *Webster v. Webster*, 23 Eng. L. & Eq. 216; *Sopwith v. Sopwith*, 2 Swab. & T. 160, 167; *Phillips v. Phillips*, 27 Wis. 252.

<sup>2</sup> *Ex parte Aldridge*, 1 Swab. & T. 88, 89; *Davies v. Davies*, 55 Barb. 130, 37 How. Pr. 45; *Evans v. Evans*, 7 Jur.

1046; *Franklin v. Franklin*, 7 Jur. 135; *Curtis v. Curtis*, 1 Swab. & T. 192; *Bostock v. Bostock*, 1 Swab. & T. 221; *Farnham v. Farnham*, 73 Ill. 497.

<sup>3</sup> *Threewits v. Threewits*, 4 Des. 560, 574. Also *Questel v. Questel*, *Wright*, 491; *Calkins v. Long*, 22 Barb. 97; *Robbins v. Robbins*, 100 Mass. 150, 152, 97 Am. D. 91; *Sullivan v. Sullivan*, 34 Ind. 368; *Cass v. Cass*, 34 La. An. 611; *Gordon v. Gordon*, 88 N. C. 45, 43 Am. R. 729; *Phillips v. Phillips*, 27 Wis. 252; *Atteberry v. Atteberry*, 8 Or. 224.

<sup>4</sup> Ante, § 304, 310, 314.

<sup>5</sup> *Collins v. Collins*, 10 Scotch Sess. Cas. 4th ser. 250, 9 Ap. Cas. 205.

curred after the condonation might be inadequate standing alone.<sup>1</sup> One form of the rule is that, in the language of Dr. Lushington, where parties are shown to “have been cohabiting in an illicit connection, it must be presumed, if they are still living under the same roof, that the criminal intercourse subsists, notwithstanding those who live under the same roof are not prepared to depose to that fact.”<sup>2</sup> In possible line with this, we have a brief report of a case decided by the judicial committee of the Privy Council, in 1840, as follows: “Though a slighter offence (not a slight offence) will revive an offence condoned, and will, combined with it, operate as a ground of divorce; still the allegation of a subsequent offence will not so revive the former one as to render it admissible as a portion of the proofs, or as a corroboration of doubtful proofs, or as a complement to insufficient proofs, of the subsequent act,”<sup>3</sup> — an enunciation of doctrine not sufficiently lucid to be much of a guide to anything.

§ 321. **One Offence reviving Another.** — Whenever a matrimonial offence has been condoned, whether the divorce which it authorizes is from bed and board or from the bond of matrimony, the doctrine is nearly or quite universal that any other offence adequate for either form of divorce will revive it.<sup>4</sup> Such conduct, whether of a nature corresponding to the original wrong or not, covers the whole idea of conjugal unkindness.

§ 322. **Lapse of Time after Condonation — Obliterating.** — The proposition is reasonable and not altogether without judicial support, that in proportion as a condoning cohabitation is extended and the offence becomes stale, will the reviving of it require greater conjugal unkindness.<sup>5</sup> And we have even intimations, though probably no absolute authority, that this course of things may after a long time so obliterate the offence as to take away the conditional quality from the condonation. Dr. Lushington once said: “I must inquire whether any one in particular, or

<sup>1</sup> *Sinton v. Irvine*, 11 Scotch Sess. Cas. 1st ser. 402; *Reg. v. Dunn*, 12 A. & E. 599, 619. And see *French v. French*, 14 Gray, 186, 188; *Davies v. Davies*, 55 Barb. 130, 37 How. Pr. 45.

<sup>2</sup> *Turton v. Turton*, 3 Hag. Ec. 338, 5 Eng. Ec. 130, 136; *Smith v. Smith*, 4 Paige, 432, 27 Am. D. 75.

<sup>3</sup> *Collett v. Collett*, 8 Monthly Law Mag. 158, Wadd. Dig. 44.

<sup>4</sup> *Dent v. Dent*, 4 Swab. & T. 105; *Newsome v. Newsome*, Law Rep. 2 P. & M. 306; *Johnson v. Johnson*, 14 Wend. 637; *Timerson v. Timerson*, 2 How. Pr. n. s. 526; *Blandford v. Blandford*, 8 P. D. 19; *Warner v. Warner*, 4 Stew. Ch. 225; *Palmer v. Palmer*, 2 Swab. & T. 61, 62. Compare with *Furness v. Furness*, 2 Swab. & T. 63.

<sup>5</sup> *Phillips v. Phillips*, 27 Wis. 252.

all united, of the transactions I have examined, demand from the court a separation. Will the occurrence at Irnham, in 1824, proved by one witness, and condoned for thirteen years, — condoned by acts without number, by a long series of conduct which denotes a total oblivion, an entire forgetfulness of it in every step taken, a conduct wholly inconsistent with a fear or even apprehension of repetition? I doubt the doctrine of revival applying to such a case at all.”<sup>1</sup>

§ 323. **By Express Words.** — In principle, it is doubtful whether express words can qualify or obliterate the condition which the law attaches to condonation; because marriage and divorce are creatures of the law, regulated by public authority for the public good, and arrangements by parties contrary to the law and its policy are void.<sup>2</sup> But this doctrine cannot extend beyond its reasons. Thus, in England, since the judicial summons described in our first volume,<sup>3</sup> an absolute and unconditional condonation in articles of separation is irrevocable;<sup>4</sup> yet we have probably no authority for giving the like effect to such articles in this country where the old doctrine, by which this sort of stipulation is contrary to the policy of the law and void, prevails.<sup>5</sup> Still, that there may be a condonation by words we have already seen,<sup>6</sup> and in numerous cases it has been assumed and even held that the terms thereby expressed may be taken into consideration on the question of the condition.<sup>7</sup> The facts of cases vary: it is believed that the principle is correctly stated in this section, and the rest must be left to future judicial investigation.

#### V. *The Distinction between the Law and the Evidence.*

§ 324. **Fact for Jury.** — When the divorce cause is tried before a jury, it will be a question of fact for them whether or not there has been a condonation.<sup>8</sup> Yet, —

<sup>1</sup> *Dysart v. Dysart*, 1 Rob. Ec. 106, 141, 142. And see observations of Lord Stowell in *Beeby v. Beeby*, 1 Hag. Ec. 789, 3 Eng. Ec. 338.

<sup>2</sup> *Bishop Con.* § 467-549.

<sup>3</sup> Vol. I. § 1263-1267.

<sup>4</sup> *Rose v. Rose*, 8 P. D. 98.

<sup>5</sup> Vol. I. § 1268, 1274, 1282.

<sup>6</sup> *Ante*, § 274.

<sup>7</sup> *Bramwell v. Bramwell*, 3 Hag. Ec.

618, 5 Eng. Ec. 232, 238, 239; *Rowley v. Rowley*, Law Rep. 1 H. L. Sc. 63, 3 Swab. & T. 338, 4 Swab. & T. 137; *Newsome v. Newsome*, Law Rep. 2 P. & M. 306, 312, 313, 1 Eng. Rep. 241; *Timerson v. Timerson*, 2 How. Pr. n. s. 526; *Lewis v. Lewis*, 75 Iowa, 200; *Blandford v. Blandford*, 8 P. D. 19.

<sup>8</sup> *Peacock v. Peacock*, 1 Swab. & T. 183.

§ 325. **Law mingling.** — Relating to this fact, there will be more or less of law, to be passed upon by the judge. And the line which here separates the law and the evidence does not lie so clear to the legal sight as it does in some other issues. Under the proofs in most cases, condonation is a presumption of law from cohabitation with knowledge of the guilt.<sup>1</sup> If, therefore, a husband has voluntarily cohabited with his wife knowing that she had committed adultery and he could prove it, it is easy to say that condonation is conclusively presumed by the law.<sup>2</sup> At the same time, the facts from which it flows are for the jury. Suppose, then, it appears on the wife's suit that, when she and her husband were in a foreign country, situated so and so, as the testimony explains, she for the first time became aware of the existence of the adultery, yet, for reasons which the testimony also unfolds, continued to occupy the same bed with him until, an opportunity which the testimony states in detail occurring, she, in so many days after she became cognizant of the adultery, withdrew from his bed and table,<sup>3</sup> — suppose the facts here indicated are shown beyond dispute, — What has the judge to do with them? what has the jury?

§ 326. **How, in Principle, Charge to Jury.** — To the writer it seems that in all cases wherein there is no doubt of what did transpire, — no doubt, also, as to what the party against whom the condonation is set up knew to have occurred, — no doubt as to what cohabitation, under knowledge, did take place, — the question whether it worked a condonation is of law for the court, not of fact for the jury. Yet it will be seldom that the issue and evidence will present themselves in this way. There will be testimony conflicting or uncertain, or on the effect of which the parties will not agree, then, when it is in, the judge must state to the jury the general principles relating to condonation, and tell them that if they are satisfied such and such things took place, they must find such a result; if not, such another; and so on, as in other cases made up of law and fact mingling. Still, —

§ 327. **Other Questions,** — not answered by the above suggestions, will arise. Those suggestions are not meant to cover all possibilities in all cases. They conduct the reader as far out from the

<sup>1</sup> Ante, § 273, 285.

<sup>2</sup> In *Keats v. Keats*, 1 Swab. & T. 334, 345, is given the substance of a charge

to the jury, which it may be helpful to consult.

<sup>3</sup> Ante, § 277, 282, 284, 307:

line of adjudication, and as far into the region of speculation, as the writer deems it prudent to go.

## VI. *The Evidence.*

§ 328. **Already**, — in consequence of the close combining of the law and the evidence in condonation, we have necessarily, while nominally in the foregoing sub-titles treating only of the law, brought largely to view the principles which govern the evidence. Not much remains for this sub-title.

§ 329. **Compared with Connivance**. — Condonation requires less conclusive evidence than connivance; because, in the language of Dr. Lushington, it “may take place without imputing, either in the case of a wife or a husband, the slightest degree of blame; especially in the case of the wife, whose conduct might be more meritorious from her forgiveness of injury. But connivance necessarily involves criminality on the part of the individual who connives; and as the blame sought to be imputed is the more serious, so ought the evidence in support of such a charge to be the more grave and conclusive.”<sup>1</sup> Still, —

§ 330. **Cover Allegation — (Knowledge)**. — The evidence must, at all points, affirmatively establish the allegation; covering each of the several facts whereof condonation is composed. For example, simply to prove cohabitation subsequently to an adultery whereof condonation is set up, is not enough; the party’s knowledge of it, while thus cohabiting, must also distinctly appear.<sup>2</sup>

§ 331. **Separation Deed**. — There may be in a separation deed such an implied confession as will revive a condoned offence. Sir John Nicholl once said, referring to articles before him: “As a deed of separation upon mutual agreement on account of unhappy differences, though containing a covenant not to bring a suit for the restitution of conjugal rights, these articles would offer no impediment to the husband’s present suit; but as evidence against him necessarily implying a confession of ill usage subsequent to the condonation, they appear unanswerable, and are a strong

<sup>1</sup> *Turton v. Turton*, 3 Hag. Ec. 338, 5 Eng. Ec. 130, 136; ante, § 223.

<sup>2</sup> *Durant v. Durant*, 1 Hag. Ec. 733, 3 Eng. Ec. 310, 319; *Popkin v. Popkin*, 1 Hag. Ec. 765, note, 3 Eng. Ec. 325, 326. “The previous knowledge of the adultery

must be clearly made out; and the circumstances from which it is to be inferred require to be of pregnant and indisputable import.” 1 *Fras. Dom. Rel.* 668, refers to *Greenhill v. Ford*, 2 *Shaw Ap. Cas.* 435.

acknowledgment that the *casus fœderis* had occurred. On that confession alone, coupled with the character of his temper and former acts, if the case had even rested here, if the parties had never met after the execution of that deed, I should have entertained considerable doubt whether the husband was entitled to the aid of the court to compel his wife to return; and whether the court would not at least dismiss the wife," — the case being one in which he sued for restitution of conjugal rights, and she defended by setting up the cruelty.<sup>1</sup> In reason, the presumption of revival from the mere fact of separation must be slight. What comes from the language of the deed will vary, of course, with the words and with the circumstances.

### VII. *Statutes relating to this Subject.*

§ 332. **In England.** — Something of the present English Divorce Act, and whether or not it has modified the unwritten law of this subject, has already been considered.<sup>2</sup>

§ 333. **With us.** — The statutes in most of our States mention the defence of condonation, but generally in a way nowise modifying the unwritten law. Yet no prudent practitioner will take steps in this sort of case without first consulting the statutes of his own State.

§ 334. **In North Carolina** — there was formerly a statute which would seem to have destroyed the conditional quality of condonation. It provided that if the husband has admitted his wife into conjugal society after knowledge of the criminal fact, it shall be a perpetual bar to a divorce. It was not construed to deprive the husband of divorce for subsequent adultery.<sup>3</sup> This statute appears to the writer to have been repealed, though he has not deemed it important to look through the books of this State absolutely to determine. At all events, a North Carolina condonation is now upon the usual condition explained in this chapter.<sup>4</sup>

§ 335. **In Louisiana** — there is a former and probably continuing provision that the divorce action shall be extinguished by a recon-

<sup>1</sup> *Westmeath v. Westmeath*, 2 Hag. Ec. Supp. 1, 115, 4 Eng. Ec. 238, 291.

<sup>2</sup> *Ante*, § 314, 315.

<sup>3</sup> *Collier v. Collier*, 1 Dev. Eq. 356. But in such a case the court might exercise its discretion to grant a divorce from

bed and board only. *Ib.* And see *Earp v. Earp*, 1 Jones Eq. 239, 241.

<sup>4</sup> *Lassiter v. Lassiter*, 92 N. C. 129; *Gordon v. Gordon*, 88 N. C. 45, 43 Am. R. 729. And see *Sparks v. Sparks*, 94 N. C. 527.

ciliation, but the party may "bring a new suit for causes arising since the reconciliation, and therein make use of the former motives to corroborate his new action." Therefore sufficient cause to found a divorce must have arisen subsequently to the reconciliation.<sup>1</sup> At the same time, the earlier acts may be shown to corroborate and give significance to the post-condonation ones.<sup>2</sup>

§ 336. *The Doctrine of this Chapter restated.*

Forgiveness of injury, especially in response to repentance, is deemed in law as well as in morals commendable. And when a married party, knowing the other to have committed an offence authorizing divorce, and having the ability to prove it, continues or renews the connubial intercourse, a forgiveness thereof, technically termed condonation, is conclusively presumed. But to prevent scandal in the community, and especially to induce injured consorts to condone this sort of wrong instead of proceeding for a divorce, the law attaches to the condonation the condition that neither the like matrimonial wrong, nor any other of a sort authorizing divorce, nor yet any conjugal unkindness though progressing less far, shall be committed by the forgiven party. On a violation of the condition, the original right of divorce revives. Such is the doctrine. The applications of it will somewhat vary with the sex, with the nature of the particular offence, and with the other circumstances.

<sup>1</sup> *J. F. C. v. M. E.* 6 Rob. La. 135; *Bienvenu v. Her Husband*, 14 La. An. 386. See, as to Texas, *Nogees v. Nogees*, 7 Tex. 538, 58 Am. D. 78.

<sup>2</sup> *Cass v. Cass*, 34 La. An. 611. And see *Terrell v. Boorman*, 34 La. An. 301; *Mack v. Handy*, 39 La. An. 491; *Jacobs v. Tobelman*, 36 La. An. 482.

## CHAPTER XI.

## RECRIMINATION.

- § 337. Introduction.
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- 406. Law and Evidence distinguished.
- 407, 408. The Evidence.
- 409. Doctrine of Chapter restated.

§ 337. **How Chapter divided.** — We shall consider, I. The Doctrine in General; II. Particular Propositions; III. How where the Recriminatory Wrong has been condoned; IV. The Distinction between the Law and the Evidence; V. The Evidence.

I. *The Doctrine in General.*

§ 338. **Differences.** — Universally, in England and this country, recrimination is accepted as a valid answer to a suit for divorce. But there have been various conflicts of opinion concerning the precise limits of the doctrine, and perhaps some of them remain. Hence, —

§ 339. **Difficulty of Defining.** — A definition being legal doctrine epitomized,<sup>1</sup> no one definition can satisfy all readers while their opinions differ upon the doctrine itself. In a case of this sort, an author has his election of three methods, — first, to give an alternative definition for each differing opinion; secondly, to construct a definition covering that whereon all agree, leaving the rest undefined; thirdly, to present in a single definition what he deems to be the better law. The last is the course which will be here pursued. It will not prevent explanations of such departures from the better doctrine as the books disclose. On this principle of defining, —

<sup>1</sup> Vol. I. § 12.



§ 340. **Defined.** — Recrimination in divorce law is the defence that the applicant has himself done what is ground for divorce either from bed and board or from the bond of matrimony. It bars the suit founded on whatever cause, whether the defendant is guilty or not.<sup>1</sup> But —

§ 341. **France — Scotland.** — There are systems of law wherein this defence is not recognized. So it is said to have been in France when the wife's adultery, but not the husband's, was there ground for separation; for the husband's adultery not being criminatory as a charge against him, it could not be recriminatory on a charge against her.<sup>2</sup> Into Scotland, as into England, the doctrine was imported from the Roman and canon laws, and it there long prevailed. Finally, the Scotch courts refused to recognize it except as foundation for a cross-suit. When there are cross-suits, a decree will not be pronounced in the first until both are ripe for judgment, unless in cases of unnecessary delay. If both parties show themselves entitled to the divorce, the court will, on demand of either, order the decree to be entered. Substantially, therefore, recrimination is now no bar to a divorce in Scotland, "though mutual guilt may affect patrimonial consequences."<sup>3</sup> But on these questions there were some doubts as late as 1870. It was then in effect decided that the court will not proceed to the decree in the first action until the second is heard; and if both are sustained by the proofs, simultaneous sentences of divorce will be pronounced. And still the collateral consequences of these sentences, giving each a divorce against the other at the same instant, appear not to be precisely determined. Lord Ardmillan, in a series of cases in which these questions were agitated, protested against the whole doctrine. In one, he said: "It is settled by the case of Lockhart that in an action of divorce recrimination is not a good defence, but that the averments which support a charge of recrimination may be made the foundation of a counter action. But the question whether decree shall be pronounced in both or in either of the mutual actions of divorce is a different matter. I think that there enters inherently and deeply into the contract of marriage an obligation before God and man that the contract shall be faithfully kept by both of the contracting parties. Divorce

<sup>1</sup> Post, § 349, 365, 368.

<sup>3</sup> Lockhart v. Henderson, Mor. Dict.

<sup>2</sup> Lord Stowell, in Forster v. Forster, 1 App. (Adultery, No. 1), 1, 2; 1 Fras. Dom. Rel. 672.

1 Hag. Con. 144, 4 Eng. Ec. 358, 360.

is in my opinion a remedy provided for the innocent party, and is not intended for cases in which both parties are guilty. There is the highest authority in the law of England to that effect, and the older law of Scotland was to the same effect; and unless it has been otherwise conclusively settled by our more recent authorities, I am inclined to think that the old Scottish law is sound and salutary, and that the same principle will be found to be applicable to the law of divorce in both countries.”<sup>1</sup> Returning to our own law and its sources, —

§ 342. **Origin.** — The doctrine of recrimination constituted a part of the Mosaic law of marriage and divorce.<sup>2</sup> Thence it found its way into the Roman and canon law;<sup>3</sup> it flowed downward into that of the English ecclesiastical courts, and thus came to us as American unwritten law.

§ 343. **As viewed by Ecclesiastical Judges.** — “The doctrine,” observes Lord Stowell, “has its foundation in reason and propriety. It would be hard if a man could complain of the breach of a contract which he has violated; if he could complain of an injury when he is open to a charge of the same nature. It is not unfit, if he who is the guardian of the purity of his own house has converted it into a brothel, that he should not be allowed to complain of the pollution which he himself has introduced; if he who has first violated his marriage vow should be barred of his remedy. The parties may live together, and find sources of mutual forgiveness in the humiliation of mutual guilt.”<sup>4</sup> They are “suitable and proper companions.”<sup>5</sup> Yet though neither can enforce a remedy against the other, they are not required to live together contrary to the choice of either; for, under the English law as we received it, the court would not, in a suit for the restitution of conjugal rights, compel them.<sup>6</sup>

§ 344. **On what Reasons in our Law.** — Though thus the defence of recrimination is shown to have come to us legitimately and

<sup>1</sup> *Brodie v. Alexander*, 8 Scotch Sess. Cas. 3d ser. 854, 856; *Fraser v. Walker*, 9 Scotch Sess. Cas. 3d ser. 460; *Fraser v. Walker*, 9 Scotch Sess. Cas. 3d ser. 1091.

<sup>2</sup> Deut. xxii. 13–19.

<sup>3</sup> *Proctor v. Proctor*, 2 Hag. Con. 292, 297; *Beeby v. Beeby*, 1 Hag. Ec. 789, 3 Eng. Ec. 338; *Leicester's Case*, cited 1 Hag. Con. 148.

<sup>4</sup> *Beeby v. Beeby*, 1 Hag. Ec. 789, 790, 3 Eng. Ec. 338, 339. See 2 Greenl. Ev. § 52; *Mattox v. Mattox*, 2 Ohio, 233, 15 Am. D. 547.

<sup>5</sup> Chancellor Walworth, in *Wood v. Wood*, 2 Paige, 108, 111.

<sup>6</sup> *Hope v. Hope*, 1 Swab. & T. 94; *Govier v. Hancock*, 6 T. R. 603; *Chambers v. Chambers*, 1 Hag. Con. 439, 4 Eng. Ec. 445, 450; Vol. I. § 1661.

from a high source, this historical view is of little consequence ; for the doctrine adheres and is firmly fixed in our common-law and equity system of jurisprudence. The author explained the principle in another work.<sup>1</sup> A view adequate for our present elucidations is that, extending through our entire law, yet variously modified according to the particular issue, there is a rule which forbids redress to one for an injury done him by another, if himself in the wrong about the same thing whereof he complains.<sup>2</sup> And it will not avail the plaintiff that he is less in fault than the defendant : he must come into court, as the expression is, with *clean hands*.<sup>3</sup> Thus, —

§ 345. *Illustrations.* — In a suit for damages from a collision in the highway, caused by the defendant's careless driving, or by an obstruction which he put into the way, the plaintiff to recover must himself have driven carefully.<sup>4</sup> In a suit for the breach of a contract resting in mutual and dependent promises, the plaintiff, if he would succeed, must have kept his promise.<sup>5</sup> A woman seduced and gotten with child cannot maintain an action against the seducer for the injury ; because, in yielding to his embraces, she likewise was in the wrong.<sup>6</sup> One who, in violation of a statute, sells intoxicating drinks without license, cannot have damages of another for a libel upon him in respect of such illegal business ;<sup>7</sup> neither will an action lie for a libel on one concerning any other unlawful vocation he is pursuing ;<sup>8</sup> nor for a wrong suffered in a matter about which the plaintiff was attempting a fraud on the public ;<sup>9</sup> nor to get back money lost in an unlawful game or

<sup>1</sup> Bishop Non-Con. Law, § 54-64.

<sup>2</sup> *Bush v. Brainard*, 1 Cow. 78, 13 Am. D. 513 ; *Burckle v. Dry Dock*, 2 Hall, 151 ; *Cassady v. Cavenor*, 37 Iowa, 300 ; *Wilson v. Bird*, 1 Stew. Ch. 352.

<sup>3</sup> *Collins v. Blantern*, 3 Wils. 341, 350 ; *Gregg v. Wyman*, 4 Cush. 322 ; *Rex v. Eden*, Lofft, 72 ; *Anonymous*, Lofft, 314 ; *Willinck v. Davis*, Harper, 260 ; *Hyatt v. Wood*, 4 Johns. 150, 4 Am. D. 258 ; *Roby v. West*, 4 N. H. 285, 17 Am. D. 423 ; *Freeman v. Sedwick*, 6 Gill, 28, 46 Am. D. 650.

<sup>4</sup> Bishop Non-Con. Law, § 459, 1012-1014, 1018, 1146 ; *Washburn v. Tracy*, 2 D. Chip. 128, 15 Am. D. 661 ; *Smith v. Smith*, 2 Pick. 621, 13 Am. D. 464 ; *Butterfield v. Forrester*, 11 East, 60 ; *Flower v. Adam*, 2 Taunt. 314 ; *Lane v. Crombie*,

12 Pick. 177 ; *Harlow v. Humiston*, 6 Cow. 189 ; *Owen v. Hudson River Rld.* 2 Bosw. 374. And see *Wood v. Waterville*, 4 Mass. 422 ; *Hawkins v. Cooper*, 8 Car. & P. 473 ; *Williams v. Richards*, 3 Car. & K. 81.

<sup>5</sup> Bishop Con. § 1420-1423 ; *Boone v. Missouri Iron Co.* 17 How. U. S. 340 ; *Prothro v. Smith*, 6 Rich. Eq. 324.

<sup>6</sup> Bishop Non-Con. Law, § 57, 386 ; *Paul v. Frazier*, 3 Mass. 71, 3 Am. D. 95 ; *Hamilton v. Lomax*, 26 Barb. 615.

<sup>7</sup> *Wilbor v. Williams*, 8 Law Reporter, 439. The exceptions reported to have been taken were afterward abandoned.

<sup>8</sup> *Hunt v. Bell*, 1 Bing. 1 ; *Manning v. Clement*, 7 Bing. 362.

<sup>9</sup> *De Wurtz v. Hendricks*, 2 Bing. 314.

wager;<sup>1</sup> nor to enforce a contract or other supposed right founded on a violation of a statute<sup>2</sup> or of the common-law;<sup>3</sup> nor to recover the rent of a house which the plaintiff has let to be used for prostitution.<sup>4</sup> If a man negligently so leaves his own land, upon which the cattle of his neighbor are in the habit of trespassing, that they die in consequence of a repetition of the trespass,—as, if he leaves maple syrup in his unenclosed woods, and they are killed in drinking it,<sup>5</sup> or carelessly digs a pit, and they fall into it,<sup>6</sup>—the owner of the cattle can maintain no action, because they were wrongfully on the land.<sup>7</sup> Now,—

§ 346. **Applied to Divorce.**—The doctrine which is thus seen to extend through the entire field of our jurisprudence prevails therefore in the divorce law. If in the former it is a little variable and in some respects its exact form and proportions are uncertain, so in the latter there are or have been judicial doubts and conflicts concerning it, and some differences created by legislation. But in a general way the doctrine is everywhere recognized.<sup>8</sup> To begin by speaking negatively,—

§ 347. **Nullity Suit.**—In a suit to declare a marriage void from the beginning, there is plainly no scope for recrimination. For in the first place, as the ground for relief is necessarily presented to the court, the void marriage cast no duties on the plaintiff and he could have committed no offence against it; in the second place, were he guilty of a matrimonial offence, it would not pertain to the same matter as his complaint. The assumed bar would have been a violation of a marriage, while the allegation was that there was no marriage to violate.<sup>9</sup> Again,—

<sup>1</sup> Perkins v. Eaton, 3 N. H. 152; McCullum v. Gourlay, 8 Johns. 147; Howson v. Hancock, 8 T. R. 575; Vandyck v. Hewitt, 1 East, 96. And see Spalding v. Bank of Muskingum, 12 Ohio, 544; Morgan v. Groff, 5 Denio, 364, 49 Am. D. 273; Bonner v. Montgomery, 9 B. Monr. 123; McKinney v. Pope, 3 B. Monr. 93; Lyle v. Lindsey, 5 B. Monr. 123. And see Bishop Con. § 531–533, 535, 627.

<sup>2</sup> Booth v. Hodgson, 6 T. R. 405; Bancroft v. Dumas, 21 Vt. 456; Fales v. Mayberry, 2 Gallis. 560; Willinck v. Davis, Harper, 260.

<sup>3</sup> New Brunswick State Bank v. Moore, 2 Southard, 470.

<sup>4</sup> Girardy v. Richardson, 1 Esp. 13.

<sup>5</sup> Bush v. Brainard, 1 Cow. 78.

<sup>6</sup> Blyth v. Topham, Cro. Jac. 158.

<sup>7</sup> Bishop Non-Con. Law, § 845.

<sup>8</sup> Derby v. Derby, 6 C. E. Green, 36; Angelo v. Angelo, 81 Ill. 251; Dismukes v. Dismukes, 1 Tenn. Ch. 266; Handy v. Handy, 124 Mass. 394; Horne v. Horne, 72 N. C. 530.

<sup>9</sup> In the nullity suit of M. v. D. 10 P. D. 75, 175, recrimination would have been an effectual defence if available. So in Scotland a woman may have a divorce for her husband's impotence though since the marriage she has had a child by another man. A. B. v. C. B. 11 Scotch Sess. Cas. 4th ser. 1060; affirmed, nom. C. B. v. A. B. 12 Scotch Sess. Cas. 4th ser. H. of

§ 348. **Less than Cause for Divorce.** — Where a plaintiff has been guilty of ill conduct less or other than the law requires for divorce, it may, or not, have the effect to bar his suit.<sup>1</sup> We shall see something of this question in a subsequent chapter.<sup>2</sup> But as the present writer understands our law language, it is not common to contemplate a bar of this sort under the name Recrimination.<sup>3</sup> On the other hand, —

§ 349. **Mutual Grounds for Divorce.** — If we view marriage as a contract, then if a plaintiff comes into court alleging that the defendant has done what entitles him to have the contract partly or fully set aside by a divorce from bed and board or the bond of matrimony, whereupon the defendant shows that the plaintiff is equally subject to a like decree, whether because of the same form of the breach of contract or any other, — the thing complained of on the one side and set up in defence on the other being that the other party has broken the mutual marriage contract, — the plaintiff stands before the court as himself in fault about the same thing for which he asks redress, he does not come into court with clean hands, consequently he is not entitled to relief. And if we substitute the word “status” for “contract,” in this proposition, it will be equally sound in our jurisprudence and in common-sense. Such is believed to be the true law of the subject, not derived simply from the decisions in divorce causes, but adhering in our entire legal system.<sup>4</sup> The simplest form of it in divorce is where there is —

§ 350. **Mutual Adultery.** — By all opinions, English and American, one shown to be guilty of adultery cannot have a divorce for adultery committed by the other. And it makes no difference which was the earlier offence, or even that the plaintiff’s followed a separation which took place on discovery of the defendant’s.<sup>5</sup> It has also been held, and it is little questioned, that a single act of adultery is sufficient in bar, whatever the extent of guilt on the other side.<sup>6</sup> But, —

L. 36. But this decision should be compared with ante, § 341.

<sup>1</sup> For example, Vol. I. § 1640–1647.

<sup>2</sup> Post, c. 13.

<sup>3</sup> See post, § 381.

<sup>4</sup> Ante, § 340; post, § 365, 368.

<sup>5</sup> Proctor v. Proctor, 2 Hag. Con. 292;

Brisco v. Brisco, 2 Add. Ec. 259, 2 Eng.

Ec. 294; Poynter Mar. & Div. 224, 225;

Smith v. Smith, 4 Paige, 432, 27 Am. D.

75; Mattox v. Mattox, 2 Ohio, 233, 15

Am. D. 547; Christianberry v. Christian-

berry, 3 Blackf. 202, 25 Am. D. 96; Wood

v. Wood, 2 Paige, 108; 2 Kent Com. 100;

Flavell v. Flavell, 5 C. E. Green, 211, 7

C. E. Green, 599.

<sup>6</sup> Astley v. Astley, 1 Hag. Ec. 714, 3

Eng. Ec. 303, 307; 2 Greenl. Ev. § 52.

§ 351. **Cruelty in Bar of Adultery.**—Under the ecclesiastical law, whereby adultery and cruelty were equally ground of divorce from bed and board, it was in England latterly, and whether or not also at the time when we derived thence our unwritten law we shall see in the next sub-title,<sup>1</sup> the doctrine of the ecclesiastical courts that cruelty would not bar in recrimination the suit for adultery.<sup>2</sup> On the other hand,—

§ 352. **Adultery in Bar of Cruelty.**—Under the same system of law, the converse had not been laid down; namely, that the husband could not defend the wife's suit for cruelty by showing her adultery;<sup>3</sup> indeed, it appears that he could.<sup>4</sup>

§ 353. **Cruelty in Bar of Cruelty.**—As to whether, by the law administered in the ecclesiastical courts, cruelty would bar cruelty, an English writer says: "It may seriously be doubted whether a recrimination of cruelty is a good plea in answer to a suit charging the same offence."<sup>5</sup> The question appears not to have been in those courts decided.<sup>6</sup>

§ 354. **With Us.**—It is not universal doctrine and without exception that everything which was law in the mother country became, on the emigration of our ancestors from England, such with us. And especially did we not receive from the ecclesiastical courts all their *dicta*, or necessarily every one of their adjudications.<sup>7</sup> The ecclesiastical divorce law was in England a growth separate from that administered in the common-law and equity tribunals. Its nurture and development there were from judges not familiar with the other systems of the English law.

<sup>1</sup> Post, § 371-376.

<sup>2</sup> Harris v. Harris, 2 Hag. Ec. 376, 4 Eng. Ec. 160, 176; Cocksedge v. Cocksedge, 1 Rob. Ec. 90; Scrivener v. Scrivener, cited 1 Rob. Ec. 92; Eldred v. Eldred, 2 Curt. Ec. 376, 7 Eng. Ec. 144; Chettle v. Chettle, 3 Phillim. 507. Though, in the ecclesiastical courts, cruelty alone was not pleadable in bar of a suit for adultery, it could be joined with a plea of adultery, on the ground that proof of it aids the proof of the other. Cocksedge v. Cocksedge, supra; Arkley v. Arkley, 3 Phillim. 500, 1 Eng. Ec. 461; Forster v. Forster, 1 Hag. Con. 144, 4 Eng. Ec. 358, 360; Eldred v. Eldred, supra. But a defending wife could not set up the sole plea of her husband's cruelty as foundation for a divorce for it, should he fail in

proving adultery against her. Scrivener v. Scrivener, cited 1 Rob. Ec. 92. And query, whether, where in answer to a suit for adultery the wife pleaded both adultery and cruelty, and the adultery was not proved on either side, but the cruelty was proved, she could then have a decree of divorce for the cruelty. Cocksedge v. Cocksedge, supra.

<sup>3</sup> Dillon v. Dillon, 3 Curt. Ec. 86, 7 Eng. Ec. 377, 380. See Best v. Best, 1 Add. Ec. 411, 2 Eng. Ec. 158, 171; Bancroft v. Bancroft, 4 Swab. & T. 84.

<sup>4</sup> Watkyns v. Watkyns, 2 Atk. 96. See Grossi v. Grossi, Law Rep. 3 P. & M. 118.

<sup>5</sup> Brandt Div. 87.

<sup>6</sup> See post, § 363.

<sup>7</sup> Vol. I. § 115-149.

With us, separated from ecclesiastical courts, and committed to the administration of the common-law and equity judges, it became a part of our ordinary juridical system; and by the principles of this system, rather than by any anomalous ideas of the English ecclesiastical judges, it ought in our courts to be shaped. And we have seen that those principles would lead to conclusions a little variant from those entertained in the ecclesiastical courts at the time of the settlement of this country. Thus, —

§ 355. **Adultery in Bar of Cruelty.** — Our courts, whatever be the English view,<sup>1</sup> distinctly hold that adultery will bar a divorce suit from bed and board for cruelty,<sup>2</sup> especially when it is the earlier in date.<sup>3</sup> To be sure, in various States wherein this has been so ruled, the divorce for adultery was from the bond of matrimony, but this difference is believed to be without importance. And —

§ 356. **In other Respects,** — with perhaps a few exceptions, our judicial determinations have proceeded, as we have seen they should, on principles adhering in our general jurisprudence, rather than on any servile following of the English ecclesiastical judges. The particulars will appear in our next sub-title. As to the —

§ 357. **Later English Law.** — The English law of recrimination has not been altered in respect of divorce from bed and board. But as to marriage dissolution, the Divorce Act, which went into effect in 1858,<sup>4</sup> after mentioning the several bars of connivance, condonation, and collusion, has, in lieu of the unwritten rule, the following original provision; namely, “that the court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall, in the opinion of the court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.”<sup>5</sup> So that —

§ 358. **Discretionary.** — Recrimination is not a bar to the dissolution suit in England if, in the particular instance, the court

<sup>1</sup> Ante, § 352.

<sup>2</sup> *Holmes v. Holmes*, Walk. Missis. 474; *Johns v. Johns*, 29 Ga. 718; *Shackett v. Shackett*, 49 Vt. 195. But see observation of Chancellor Walworth, in *Smith v.*

*Smith*, 4 Paige, 92; *Terhune v. Terhune*, 40 How. Pr. 258.

<sup>3</sup> *Bedell v. Bedell*, 1 Johns. Ch. 604.

<sup>4</sup> Vol. I. § 153 and note.

<sup>5</sup> Stat. 20 & 21 Vict. c. 85, § 31.

in its discretion determines it should not be.<sup>1</sup> Not quite without hesitation, the author deems that something concerning the exercise of this discretion may be helpful with us ; as, —

§ 359. **Judicial.** — The discretion is not an authority to the individual judge to do as he pleases, but a judicial discretion, proceeding upon rule.<sup>2</sup> As to —

§ 360. **Adultery in Bar.** — If the complaining party has been guilty of adultery, even though committed after the bringing of the suit, or after a decree *nisi* dissolving the marriage, but before it is made absolute, the court will not in general grant the divorce.<sup>3</sup> But under special facts, sufficiently calling for clemency, it will ;<sup>4</sup> as, for example, where the adultery set up was pursuant to a void marriage into which the party entered in good faith ;<sup>5</sup> or where it was the wife's and committed substantially under compulsion from her husband.<sup>6</sup>

§ 361. **Cruelty in Bar.** — The statute gives the discretion to withhold the dissolution decree when the court is satisfied that the petitioner has been guilty of "cruelty towards the other party."<sup>7</sup> And it would appear to be the general rule to refuse this divorce for adultery when the less offence of cruelty is proved against the petitioner.<sup>8</sup> But under special circumstances the relief will be given. Thus, in one case, Cresswell, J., on behalf of the whole court, said : "The court has now to exercise the discretion given it by the 31st section. If there were reason to believe that the misconduct of the wife had been caused by the misconduct of the husband, it would have exercised that discretion by refusing a decree for dissolution of marriage ; but it rather appears that the wife's drunken habits were the cause of the cruelty of which the jury have found the husband guilty. We think, under these cir-

<sup>1</sup> McCord v. McCord, Law Rep. 3 P. & M. 237, 239 ; Coleman v. Coleman, Law Rep. 1 P. & M. 81, 83 ; Conradi v. Conradi, Law Rep. 1 P. & M. 514, 519, 520.

<sup>2</sup> Vol. I. § 709, 1837 ; Morgan v. Morgan, Law Rep. 1 P. & M. 644.

<sup>3</sup> Hulse v. Hulse, Law Rep. 2 P. & M. 259 ; Barnes v. Barnes, Law Rep. 1 P. & M. 572 ; Robinson v. Robinson, 2 P. D. 75 ; Ravenscroft v. Ravenscroft, Law Rep. 2 P. & M. 376 ; McCord v. McCord, Law Rep. 3 P. & M. 237 ; Otway v. Otway, 13 P. D. 141.

<sup>4</sup> Morgan v. Morgan, *supra* ; Conradi

v. Conradi, Law Rep. 1 P. & M. 514, 522 ; Collins v. Collins, 9 P. D. 231.

<sup>5</sup> Freegard v. Freegard, 8 P. D. 186 ; Noble v. Noble, Law Rep. 1 P. & M. 691, 693. And see Joseph v. Joseph, 34 Law J. N. S. Mat. 96. Contra, in Massachusetts, Moors v. Moors, 121 Mass. 232.

<sup>6</sup> Coleman v. Coleman, Law Rep. 1 P. & M. 81. Compare with post, § 386.

<sup>7</sup> Ante, § 357.

<sup>8</sup> Ratcliff v. Ratcliff, 1 Swab. & T. 467, 473. And see Haswell v. Haswell, 1 Swab. & T. 502 ; Hope v. Hope, 1 Swab. & T. 94.



cumstances, that we ought to make a decree for dissolution of the marriage.”<sup>1</sup>

§ 362. **Desertion, and Conduct contributing to Adultery.** — The statute makes these wrongs discretionary bars to dissolution;<sup>2</sup> and generally the discretion will be exercised to render them such. On the mere naked fact appearing that a petitioning husband deserted his wife and afterward she committed adultery, the court refused to dissolve the marriage. “Nothing,” said Lord Penzance, “is more likely to conduce to adultery than throwing a young wife on the world without the protection of her husband.”<sup>3</sup> In another case, a man having married a prostitute with whom he was on terms of unlawful intimacy, then having against her will sent her away from under his protection to live where she was exposed to temptation, and where she actually committed adultery, the court would not grant him a divorce for this adultery.<sup>4</sup> But where, in such a case, a man separates from his wife for a reasonable cause, he can have a divorce for her subsequent adultery;<sup>5</sup> *a fortiori*, therefore, he can in the ordinary case.<sup>6</sup> In misconduct conducing to adultery is not included carelessness short of recklessness;<sup>7</sup> nor is crime, for which the party is by the law separated from the other in punishment, though otherwise the adultery would not have been committed.<sup>8</sup>

§ 363. **Cruelty and Adultery aside from Statute** — (Bed and Board). — The above statute not extending to divorce from bed and board, we have seen how cruelty and adultery in bar were severally regarded in the ecclesiastical courts.<sup>9</sup> In the later Divorce Court, Sir C. Cresswell held adultery to be sufficient in recrimination where a wife sued the husband for a judicial separation because of his cruelty. And he observed: “I think that a wife guilty of adultery

<sup>1</sup> *Pearman v. Pearman*, 1 Swab. & T. 601, 602.

<sup>2</sup> *Ante*, § 357. Compare with *ante*, § 211, 212.

<sup>3</sup> *Yeatman v. Yeatman*, Law Rep. 2 P. & M. 187, 188. Of a like sort is *Jeffreys v. Jeffreys*, 3 Swab. & T. 493.

<sup>4</sup> *Baylis v. Baylis*, Law Rep. 1 P. & M. 395.

<sup>5</sup> *Proctor v. Proctor*, 4 Swab. & T. 140. See *McCord v. McCord*, Law Rep. 3 P. & M. 237.

<sup>6</sup> *Ousey v. Ousey*, Law Rep. 3 P. & M. 223; *Davies v. Davies*, 3 Swab. & T. 221.

<sup>7</sup> *Dering v. Dering*, Law Rep. 1 P. & M. 531.

<sup>8</sup> *Cunnington v. Cunnington*, 1 Swab. & T. 475. See *Townsend v. Townsend*, Law Rep. 3 P. & M. 129. And see further on the subject of this section, *Bancroft v. Bancroft*, 4 Swab. & T. 84; *St. Paul v. St. Paul*, Law Rep. 1 P. & M. 739; *Plumer v. Plumer*, 4 Swab. & T. 257; *Whitmore v. Whitmore*, Law Rep. 1 P. & M. 96; *Conradi v. Conradi*, Law Rep. 1 P. & M. 514.

<sup>9</sup> *Ante*, § 352, 353.

cannot be a petitioner in this court on the ground of any matrimonial offence of the husband.”<sup>1</sup> And if her suit is based on his adultery, which she proves, she cannot have a judicial separation for it, when she has been guilty of cruelty, desertion, and wilful neglect conducing to the adultery.<sup>2</sup> So also it would appear, though the question is not adjudged, that if the husband has been guilty of cruelty and desertion, he cannot have even a judicial separation on account of his wife’s adultery.<sup>3</sup>

## II. *Particular Propositions.*

§ 364. **In this Sub-title,**—having in the preceding one taken a view of the general doctrine of recrimination, and seen how it is held in the country whence our laws are derived, we shall look more particularly into the minuter questions, and how they should be and are regarded by our own courts. We shall do this in the order of various propositions; namely,—

§ 365. **First.** Beginning with repeating the doctrine stated in the last sub-title as of principle,—

*It is a bar to any suit to dissolve a valid marriage, or to separate the parties from bed and board, that either before or after the complained-of delictum transpired, the plaintiff himself did what, whether of the like offending or any other, was cause for a divorce of either sort.*<sup>4</sup>

§ 366. **Adequate.**—This proposition, if accepted as sound in law, is, without more, adequate for all cases. And it embraces within itself the minor propositions to follow. But the expositions under them are required for the completer enlightenment of the reader, and for the further reason that the acceptance of this first proposition is not quite without doubt in some of the States. And—

§ 367. **In Louisiana**—it is said to be applied only where the recriminatory wrong is of a similar nature to the other, and the two are so proportioned as to render it difficult to ascertain which party is mainly in fault.<sup>5</sup> Yet under the act of April 2, 1832, § 1, providing a divorce whenever either of the married parties,

<sup>1</sup> Drummond v. Drummond, 2 Swab. & T. 269, 274.

<sup>2</sup> Boreham v Boreham, Law Rep. 1 P. & M. 77.

<sup>3</sup> Lempriere v. Lempriere, Law Rep. 1 P. & M. 569.

<sup>4</sup> Ante, § 340, 349, post, § 368.

<sup>5</sup> Dillon v. Dillon, 32 La. An. 643.

being charged with and guilty of "an infamous offence, shall actually have fled from justice and gone beyond the jurisdiction of the State," a wife who had committed adultery was held not to be entitled to this remedy; though her husband had in cold blood killed the paramour, and then fled from the State.<sup>1</sup>

§ 368. **Generally in our other States,**—not now searching for exceptions, the broad doctrine we are considering is at the time of the present writing received, former objections to it being removed. And still the facts of no one case, viewed in combination with the particular divorce statutes of the State, could in the nature of things be broad enough to cover the whole doctrine. The result of the decisions, therefore, is ascertainable only on a comparison of them.<sup>2</sup> More of this will appear in connection with the propositions to follow.

§ 369. **Secondly.** *Where the divorce is from bed and board, as it was formerly in England for adultery and cruelty respectively, the former English rule whereby cruelty is not a bar to the adultery suit is not with us to be followed.*

§ 370. **Why?**—Abundant reasons are disclosed in connection with the elucidations of our first proposition, and particularly in the last sub-title.<sup>3</sup> A reason conclusive is, that where the facts tendered to the court show a ground for divorce in favor of each of the two parties, and the law makes the consequences of the divorce different according as it is given to the one party or the other, the court cannot choose between them, extending the law's justice to the one and withholding it from the other; it cannot render a sentence in favor of both, because such sentence would contain a nullifying contradiction, giving and taking away the same thing at the same time. So that the statute, authorizing the divorce and fixing the consequences, and omitting to prefer the one offence or party over the other, by necessary construction forbids divorce either to both, or to one, to the exclusion of the other's rights.<sup>4</sup> Looking now to the authorities,—

§ 371. **What Doctrine derived from England.**—We saw in the last sub-title that assuming the English law to have been, when

<sup>1</sup> J. F. C. v. M. E. 6 Rob. La. 135.

<sup>2</sup> Some of the later cases are Morrison v. Morrison, 142 Mass. 361, 56 Am. R. 688; Haines v. Haines, 62 Tex. 216; Spahn v. Spahn, 12 Abb. N. Cas. 169; Pease v. Pease, 72 Wis. 136; Hubbard v. Hubbard,

74 Wis. 650, 651; Adams v. Adams, 12 Or. 176; Hoff v. Hoff, 48 Mich. 281; Morrison v. Morrison, 64 Mich. 53.

<sup>3</sup> For example, ante, § 344, 346, 349, 354, 356.

<sup>4</sup> And see post, § 389, 396.

our country was settled, the reverse of what is here set down, it still did not become American common law.<sup>1</sup> But an attempt will here be made to show that the later English doctrine, to which the writer is objecting, was not the law of the English ecclesiastical courts at so early a date as that of the emigration of our ancestors to this country. Thus,—

§ 372. **Ancient Doctrine.**—After considerable investigation, the author has been unable to find any trace or evidence of the objected to rule at so early a period. Ayliffe, laying down the doctrine of recrimination, refers to two decretals, or, in the language of our own law, decisions, of Pope Gregory IX.;<sup>2</sup> in the first of which it was simply held that a plaintiff who has committed adultery cannot have a divorce by reason of the defendant's adultery; in the second, that where a separation from bed and board has been had on the ground of adultery, it shall be vacated and the parties ordered to return to cohabitation if afterward the complainant himself commits adultery.<sup>3</sup> And he proceeds to say that “since there are some misdemeanors that are taken away by mutual compensation, of which adultery is one, a compensation may be made of this crime; for it is unjust for one person to judge of another, and not give another leave to judge of himself.”<sup>4</sup> Oughton states the doctrine thus: *Compensatio criminis est, si pars rea probaverit partem agentem etiam adulterium commississe absolvenda est pars rea, quoad petita in libello partis agentis.*<sup>5</sup> But this goes no further than to confirm the universally received rule that adultery may be set up in bar of a divorce suit for adultery. It does not deny, or intimate a denial, or give reasons leading to a doubt, that cruelty will have the same effect in bar. Why not? It was attended by the same consequences.<sup>6</sup>

<sup>1</sup> Ante, § 354–356.

<sup>2</sup> Lib. 4, tit. 19, c. 4 & 5, Corp. Jur. Can. p. 221 of the Decretals.

<sup>3</sup> Sanchez states the doctrine of recrimination to be, “Quia alter conjux est ejusdem criminis particeps, aut pariter adulterans; aut adulterio alterius præbens.” *De Divortio*, lib. 10, disp. 5.

<sup>4</sup> Ayl. Parer. 226.

<sup>5</sup> Oughton, tit. 214.

<sup>6</sup> At the same time it is just to say that, almost without doubt, the canon law did recognize to some extent a distinction between matrimonial offences to which it

attached the same consequences. As an instance of this, **Spiritual and Carnal Adultery in Bar of each other.**—According to the prevailing opinion of the canonists, heresy, called in the canon law spiritual adultery, might be shown in bar of a suit for carnal adultery; though Sanchez does not like the rule. But carnal adultery would not bar a divorce for spiritual adultery; because the latter was deemed the greater offence, and because it would endanger the soul of one of the spiritually faithful, carnally an adulterer, to dwell in matrimony with a heretic.

§ 373. **In the Criminal Suit** — in the Ecclesiastical Court, for the punishment of adultery, this doctrine of compensation was not applied; “for there,” said Lord Stowell, “the public, not the husband, is the injured party, and it can be no excuse for the wife’s breach of the good order of society that her husband had done so before her, whatever it might be in a mere civil prosecution, instituted by himself.”<sup>1</sup>

§ 374. **In Divorce Suit** — (**Historical, as to Cruelty in Bar**). — On the question whether or not, in the divorce suit, cruelty may be effectually pleaded in bar of the charge of adultery, the first trace of judicial opinion, as seen in the reports, appears to be in some observations which, in 1790, this learned judge made in the same case with the above, as follows: “A third plea of defence offered, but with less effect, is that his treatment of his wife was, as it really appears to have been, marked with unkindness and disaffection. I say with less effect, because if the course of unkindness was such as the law would notice, the remedy is not that to which she has unhappily resorted, but an application to this court for the protection of a separation by reason of cruelty. And if the ill-treatment is not of that gross kind against which the law would relieve in this form, still she is not to find her remedy in the contamination of her own mind and person, but in the purity of her own conduct, and in a dignified submission to an undeserved affliction.”<sup>2</sup> And two years subsequently, in another case, he observed: “Indifference, ill behavior, or cruelty is not pleadable in a suit for adultery;” that is, in bar of the suit. “*It will not justify her criminal misconduct.*”<sup>3</sup> These cases, it is perceived, are not only subsequent in date to the settlement of this country, but subsequent to the Revolution.

§ 375. **Later.** — Passing down the line of time, we come next, in 1810, to a case wherein we find from the same accomplished judge a *dictum* which has been the basis of all subsequent judicial determination on this question. It is material, not only as

Sanchez, lib. 10, disp. 16. It is scarcely necessary to observe that this output of the canon law has not travelled thence into our American jurisprudence, nor do I remember to have seen any recognition of it by the ecclesiastical judges of England. I think, therefore, that it is entitled to no effect in our present expositions. See Vol. I. § 105-109.

<sup>1</sup> Forster v. Forster, 1 Hag. Con. 144, 4 Eng. Ec. 358. And see, for illustrative matter, 1 Bishop Crim. Law, § 340, 341.

<sup>2</sup> Forster v. Forster, 1 Hag. Con. 144, 4 Eng. Ec. 358, 360, 361.

<sup>3</sup> Moorsom v. Moorsom, 3 Hag. Ec. 87, 5 Eng. Ec. 28, 30.

giving the reasons whereon the later English rule was placed by the courts, but also as showing that this first judicial expounder or promulgator of it, who probably knew more of what had gone before than almost any other ecclesiastical judge, did not consider it then settled on authority. He said: "On this plea the question might arise whether a party would be entitled to bar her husband from his remedy of divorce for adultery, proved against her, by the plea of cruelty? I am inclined to think that she would not. It is certain that the wife has a right to say, 'You shall not have a sentence against me for adultery if you are guilty of the same offence yourself.' The received doctrine of compensation would have that effect, because both parties are *in eodem delicto*; but this is not so in recrimination of cruelty; the *delictum* is not of the same kind. If the wife was the *prior petens* in a suit of cruelty, I do not know that she would be barred by a recrimination of that species; for the consideration would be very different. The court might not oblige her to cohabitation which would be dangerous. Here the husband is a *prior petens* in a suit of adultery, and I take the general doctrine to be that a wife cannot plead cruelty as a bar to divorce for her violation of the marriage bed."<sup>1</sup> Upon this Dr. Lushington has observed: "I candidly say I entertain doubts whether the reason given is the most satisfactory that could be adduced; because, if this effect arises out of the difference in the nature of the two offences, it follows, *è converso*, that where the wife has brought a suit on account of cruelty, the husband cannot plead her adultery in bar, a proposition which I am not aware has ever been laid down in these courts."<sup>2</sup> But in a later case he seems to have yielded to this reasoning of Lord Stowell.<sup>3</sup> Now, —

<sup>1</sup> *Chambers v. Chambers*, 1 Hag. Con. 439, 4 Eng. Ec. 445, 451.

<sup>2</sup> *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377, 380. See *Otway v. Otway*, 13 P. D. 141, 150, at which last place Cotton, L. J. says: "In my opinion the true principle is this, that a wife having been guilty of adultery has put herself in such a position that she cannot be considered as an innocent party in any proceedings which might have been taken in the old ecclesiastical courts, or which

might now be taken in the Court of Divorce; and therefore on that ground she is not in a position to come to that court to give her any relief as to any matrimonial offence which the husband may have committed, or to put it on the ground of compensation for a crime of the same nature." In other words, the reasoning here appears to be that a plaintiff guilty of adultery does not stand *rectus in curia* (ante, § 344, 345) when asking the court for a divorce on any ground.

<sup>3</sup> *Cocksedge v. Cocksedge*, 1 Rob. Ec. 90, 92.

§ 376. **Observations hereon.** — In the flexible practice of the ecclesiastical courts, a defendant who pleaded in defence what also entitled him to original relief, could have the latter when at the hearing his allegation was sustained by the proofs, the same as though he were plaintiff. If, then, in a mutual controversy, the one party showed ground of divorce for adultery, and the other for cruelty, where the law had given exactly the same effect to the one as to the other, it is difficult to see by what rule the judge could discriminate between the two. Neither the foregoing cases nor any others have pointed out any such proper rule. Should it be said to be that the graver offence will take precedence, the answer is that, as the judicial eye should view the two, neither is the graver. If it is contended that adultery is the graver, the reply is that whether it is or not is matter of opinion. One judge may think it is, another the reverse. But no judge is entitled to administer for law his personal opinions.<sup>1</sup> The law treats the two alike, and the court sits to administer the law; therefore it should treat them respectively as the law does. But if we assume that when this country was settled the doctrine which gives precedence to adultery was established in England, the objection stated in our last sub-title remains; namely, that it is repugnant to the body of our American jurisprudence, so it has never become common law with us.<sup>2</sup> And thus we have before us the reasons for the doctrine next to be laid down, that, —

§ 377. *Thirdly. Whether the divorce is from bed and board or from the bond of matrimony, a judicial tribunal cannot distinguish between offences to which the law attaches the same consequence.* Thus, —

§ 378. **Authorities and Illustrations.** — This was so laid down in Missouri,<sup>3</sup> and the courts of other States have followed the rule. For example, Field, J., said in a California case: “In this State the statute has specified certain acts or conduct which shall constitute grounds of divorce. And so far as the matrimonial con-

Thereupon, where the law attaches the same consequence to cruelty as to adultery, making no distinction between the two, a plaintiff guilty of cruelty is no more *rectus in curia* than one guilty of adultery. Outside of the law, we may look upon adultery as the heavier offence, but a court sits to administer the law, so

that a judge has no authority to make a distinction which the law repudiates.

<sup>1</sup> Vol. I. § 1267.

<sup>2</sup> Ante, § 354.

<sup>3</sup> Nagel v. Nagel, 12 Misso. 53, reaffirmed in Duncan v. Duncan, 12 Misso. 157.

tract is concerned, the courts cannot distinguish between them, whatever difference there may be in a moral point of view. The several offences must, therefore, be held equally pleadable in bar to the suit for divorce, — the one to the other, within the principle of the doctrine of recrimination.”<sup>1</sup> In like manner in Massachusetts, a sentence to five years’ imprisonment in the State prison and adultery being equally grounds for dissolving the marriage, one sentenced to such imprisonment cannot have the divorce for the other’s adultery. The two offences are, under the statute, said Gray, C. J., “of the same class and degree.”<sup>2</sup> The possibility of exceptions to this rule has been suggested in a sort of general way;<sup>3</sup> but the author is not aware that any definite case or circumstances have been stated or surmised, wherein the exception would be required. No such occur to him at the present writing.

§ 379. **One Offence justifying Another.** — It has sometimes been said that, for example, a husband’s cruelty does not justify the wife’s adultery, and so of the other differing matrimonial offences. This sort of observation is relevant in a criminal cause,<sup>4</sup> but not in a civil, wherein the policy of the law forbids redress to a plaintiff who is in equal fault with the defendant. The question of justification does not arise; if it did, the argument would reach too far, because the husband’s adultery, which it is admitted the wife may plead in recrimination, can no more than his cruelty justify her adultery. The matrimonial relation being one of mutual dependence and duty, all legal analogies, and all sound canons of morality, indicate that one should not be permitted to complain of the other’s infraction of one of the links of this common chain when he has equally broken another. Moreover, —

<sup>1</sup> *Conant v. Conant*, 10 Cal. 249, 256, 70 Am. D. 717.

<sup>2</sup> *Handy v. Handy*, 124 Mass. 394. And see *Shackett v. Shackett*, 49 Vt. 195, approving the opinions embodied by the present author in these discussions.

<sup>3</sup> Thus, a Texas case, while affirming the doctrine now under consideration, suggests the query whether it may not admit of modifications. In the words of Moore, J. the court did not mean by its decision to lay it down “that in no case, and under no state of circumstances, should a divorce be granted if the plaintiff is also guilty of an act of any char-

acter for which the defendant might claim a divorce. There are, unquestionably, well-established limitations in regard to this character of defence in such actions, to which, however, it is unnecessary for us to specially advert at present. The general doctrine that recrimination is a valid defence, though the divorce is sought upon other grounds than adultery, may nevertheless be said, on the very highest authority, to ‘rest in the clearest reason and exact justice.’” *Hale v. Hale*, 47 Tex. 336, 342. But see *Lovett v. Lovett*, 11 Ala. 763.

<sup>4</sup> Ante, § 373.



§ 380. **Law for Obedient.**—The law helps those who obey it, not those who violate it.<sup>1</sup> Neither of two contending persons, each guilty of the same matter of which he complains of the other, can have the assistance of the court.<sup>2</sup>

§ 381. *Fourthly. Whether the divorce sought is from bed and board or from the bond of matrimony, no form of the plaintiff's dereliction will afford a complete bar in recrimination unless it is such as the law has made ground for a divorce of the one or the other sort.*<sup>3</sup>

§ 382. **Why?**—The law is a practical system, while yet it is a science, ordained for the government of a race of beings the mass of whom are more or less erring. Allowance, therefore, must be made for human frailty.<sup>4</sup> It would be unreasonable to require perfection as the condition on which alone a plaintiff might carry on his suit for the defendant's greater wrong. But precisely where the line between the sufficient and the insufficient should be drawn is less plain. Perhaps the bar should take effect in

<sup>1</sup> See *Christianberry v. Christianberry*, 3 Blackf. 202, 25 Am. D. 96; *Rhame v. Rhame*, 1 McCord Ch. 197, 202, 16 Am. D. 597; *Mattox v. Mattox*, 2 Ohio, 233, 15 Am. D. 547; *Derby v. Derby*, 6 C. E. Green, 36.

<sup>2</sup> In an English case holding (ante, § 343) that where a husband and wife have both committed adultery and are living apart, neither can maintain a suit against the other for the restitution of conjugal rights, Cresswell, J. said: "I agree, and cannot but think, that as far as public morals and the interests of society are concerned, it would be better to act upon the suggestion, not to say the opinion, thrown out by Lord Stowell in *Beeby v. Beeby* [1 Hag. Ec. 789], that a party guilty of a breach of the marriage vow should not have the assistance of the court to enforce *any marital right*." *Hope v. Hope*, 1 Swab. & T. 94, 106, 107. Later, another learned judge, following almost exactly the views urged in my text, observed: "The divorce acts made a great change in the law of the ecclesiastical courts by constituting desertion a matrimonial offence, and by giving the larger remedy of dissolution of the marriage for the wife's adultery. It will be proper to consider how far these changes and the

general restrictions under which relief is given by those acts in cases of divorce do or do not multiply the restrictions within which judicial separation should be granted, beyond those which were recognized in the ecclesiastical courts in suits for divorce *a mensa et thoro*. And the more so because this doctrine of *compensatio criminis* is not a wholly satisfactory one, or capable of being logically adopted as a guide in giving or refusing relief. It is said that the cruelty of the husband will not justify the adultery of the wife; but so neither will his own adultery, and yet this latter has ever been held a bar. Again, what is *par delictum*? What standard has the court for the measure of matrimonial offences, except the punishment with which they are visited, or the relief to which they give a title? In a suit for divorce *a mensa et thoro*, adultery and cruelty stood upon a level in these respects; and in a suit for judicial separation they do so now. There is much to consider under these and some other heads, whenever the question arises." *Lempriere v. Lempriere*, Law Rep. 1 P. & M. 569, 571.

<sup>3</sup> Ante, § 348.

<sup>4</sup> Vol. I. § 1644, 1646, 1647.

all cases wherein conjugal unkindness,<sup>1</sup> unreformed, is shown against the plaintiff. But this rule would be difficult of application. And, on the whole, in analogy to various aspects of the law discussed in earlier parts of these volumes,<sup>2</sup> the doctrine of principle, certainly the doctrine better sustained by the authorities, is as above stated. Thus,—

§ 383. **What authorizes Separation — (Cruelty, Adultery, Desertion, in Bar).**—The misbehavior of the plaintiff, to be an absolute bar, must be such as, except for the defendant's wrong, would be foundation for at least a judicial separation. But as only adultery and cruelty were by the former English law sufficient for divorce, the operation of the rule sometimes compelled the judges to grant the divorce under a consciousness that it would be of evil tendency. Thus Lord Stowell, in a case where the complaining husband was much in fault, employed language which afterward found an echo in the clear understanding and strong moral sentiment of Dr. Lushington, as follows: "In pronouncing for a separation, I feel that I shall tolerate a negligent inattention to marital duty; and that I shall pronounce a decree that will not lead to the peace and honor of families, nor the purity of private life."<sup>3</sup> And in rejecting, under this rule, a complaining husband's utter and wilful desertion of his wife, as a bar to his divorce suit for adultery which she afterward committed,<sup>4</sup> the latter of these distin-

<sup>1</sup> Ante, § 269, 308, 309.

<sup>2</sup> Vol. I. 1217–1219, 1715, 1718, 1719, 1735 et seq.

<sup>3</sup> *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 117, 5 Eng. Ec. 28, 42; *Phillips v. Phillips*, 1 Rob. Ec. 144, 164.

<sup>4</sup> **Meaning of "Malicious."**—One cannot but feel embarrassed while attempting to state conclusions arrived at by the ecclesiastical courts, when, after reading the cases cited to this section, and others of a kindred sort, he alights on words like the following, which occur in a later decision by Sir Herbert Jenner Fust (*Clowes v. Clowes*, 9 Jur. 356, 4 Notes Cas. 1, 12) rendered in 1845: "The question of malicious desertion," he said, "is one which has frequently been adverted to in these courts, but has never yet received an absolute decision, whether it be a ground of bar to a divorce." This learned judge, however, distinguishes between "malicious" and "wilful" deser-

tion; and says that the case of *Morgan v. Morgan*, *infra*, "could not be carried beyond the wilful desertion." The distinction is nice; and it is unusual, Vol. I. § 1658, 1668. In Pennsylvania, the word *maliciously* has been adjudged an equivalent for *wilfully* in an indictment for arson. *Chapman v. C.* 5 Whart. 427, 34 Am. D. 565. And see *Butler v. Butler*, 1 Parsons, 329; 1 Bishop Crim. Law, § 427–429. In Scotland, where "*malicious* desertion" is cause for divorce, no other effect appears to be given the word "malicious" than as referring to the intent to desert; and the idea would be equally well expressed by "wilful," or by "desertion" alone without either adjective. See 1 Fras. Dom. Rel. 682, 685. In *Beeby v. Beeby*, 1 Hag. Con. 142, note, 4 Eng. Ec. 358, the court observed: "Separation is not considered by the Ecclesiastical Court as a bar to divorce for adultery, either previous or subsequent to the act alleged. It is not an

guished judges employed the following language: "She, a girl of nineteen, of great personal beauty (as stated by all the witnesses), recently married, is at once left, I will not say to the risk, but almost to the certainty, of destruction. To the wife, this marriage, followed up by a divorce leaving her without any claim to maintenance, has proved utter ruin. I do not extenuate her guilt; but I cannot forget the situation of a young married woman, thus suddenly separated from her husband. To the husband, the consequences have been some expense, some trouble, exile from home during the period he has been in India (where the wife has had no means of watching his conduct), and a judgment in this court by which, if it decrees a divorce, he will be absolved from all legal obligation of maintaining his wife; and, it may be, an act of the legislature dissolving the marriage. That such an example can be otherwise than prejudicial to public morals cannot for a moment be stated."<sup>1</sup>

§ 384. **With us**,—the causes of divorce being in most of our States more numerous, the rule operates more equitably; it need not, therefore, so much trouble the judicial conscience. And some of our statutes are in terms to help this conclusion. Thus,—

§ 385. **"Injured" Party**.—A statute declared that divorces should be granted only to "parties injured." Thereupon it was held that one who has causelessly deserted the other cannot have this remedy for the latter's subsequent adultery;<sup>2</sup> or, in the words of Dillard, J., "no husband can have the bonds of matrimony dissolved by reason of the adultery of the wife committed through his allowance, his exposure of her to lewd company, or brought about by the husband's default in any of the essential duties of

answer to such a charge, *even in cases of malicious desertion*." And see *s. r. Forster v. Forster*, 1 Hag. Con. 144, 154, 4 Eng. Ec. 358, 364. See also *Grant v. Grant*, 10 Jur. 103. But in Tennessee the court seems to have given the word "malicious," as used in the divorce statute, a meaning similar to that in the mind of Sir Herbert Jenner Fust. *Stewart v. Stewart*, 2 Swan, Tenn. 591; Vol. I. § 1668.

<sup>1</sup> *Morgan v. Morgan*, 2 Curt. Ec. 679, 7 Eng. Ec. 254, 259, 25 Leg. Obs. 18. And see observations of Chancellor Walworth, in *Peckford v. Peckford*, 1 Paige,

274. But see *Reeves v. Reeves*, 2 Phillim. 125, 1 Eng. Ec. 208, and *Sullivan v. Sullivan*, 2 Add. Ec. 299, 2 Eng. Ec. 314, where Sir John Nicholl expressed somewhat different apprehensions of the moral consequences.

<sup>2</sup> *Foy v. Foy*, 13 Ire. 90; *Tew v. Tew*, 80 N. C. 316, 30 Am. R. 84, referring also to *Whittington v. Whittington*, 2 Dev. & Bat. 64. See *Angelo v. Angelo*, 81 Ill. 251; *Wilson v. Wilson*, 40 Iowa, 230; *Harper v. Harper*, 29 Mo. 301; *Thomas v. Tailieu*, 13 La. An. 127; *Conant v. Conant*, 10 Cal. 249, 70 Am. D. 717; *Holston v. Holston*, 23 Ala. 777.

the married life, or supervenient on his separation without just cause.”<sup>1</sup>

§ 386. **Nature and Extent of Recriminatory Offence — (Adultery — Insanity — Husband's Coercion).** — Recurring to the doctrine that the plaintiff's dereliction must be of a sort authorizing divorce,<sup>2</sup> it follows that adultery by an insane party<sup>3</sup> will not be sufficient in recrimination.<sup>4</sup> (So likewise, as a sexual commerce otherwise unlawful is not the adultery which gives divorce if occurring under an innocent mistake of facts, such that if they were what they are believed to be it would be lawful,<sup>5</sup> a commerce under a marriage truly polygamous, yet non-indictable by reason of a properly entertained presumption or other belief of the death or divorce of the former consort, will not constitute the recriminatory bar.<sup>6</sup> And it is the same of the wife's adultery committed under coercion from the husband.<sup>7</sup> Beyond this, —

§ 387. **How Recriminatory Adultery proved.** — Judicial *dicta* in the ecclesiastical courts established, as far as *dicta* alone could, that to prove recriminatory adultery such strong facts are not necessary as to convict in a direct proceeding for divorce. The reason assigned was that the one who brings into court a criminal imputation on the other must purge his own conduct of all reasonable imputation of the same sort.<sup>8</sup> If by this we are to understand that the plaintiff must affirmatively satisfy the tribunal of his own innocence,<sup>9</sup> — as, by such evidence of good character as renders his adultery improbable, — we have States in which the like practice prevails.<sup>10</sup> But neither in principle nor by the common course in most of our States is this the true practice; the defendant must allege and prove the adultery he relies on in bar.<sup>11</sup> Returning to the ecclesiastical courts, though we find in one of the cases observations to the effect that solicitations of chastity short of the very act were deemed sufficient in recrimination,<sup>12</sup> this

<sup>1</sup> *Tew v. Tew*, supra, p. 318.

<sup>2</sup> Ante, § 383.

<sup>3</sup> Vol. I. § 1515.

<sup>4</sup> *Mims v. Mims*, 33 Ala. 98; *Wray v. Wray*, 33 Ala. 187.

<sup>5</sup> Vol. I. § 1507–1514.

<sup>6</sup> *Smith v. Smith*, 64 Iowa, 682; *Robertson v. Robertson*, 9 Daly, 44; *Whippen v. Whippen*, 147 Mass. 294.

<sup>7</sup> *Coleman v. Coleman*, Law Rep. 1

P. & M. 81, 83, 84. Compare with ante, § 360.

<sup>8</sup> *Forster v. Forster*, 1 Hag. Con. 144, 4 Eng. Ec. 358, 363; *Astley v. Astley*, 1 Hag. Ec. 714, 3 Eng. Ec. 303, 306.

<sup>9</sup> See *Sopwith v. Sopwith*, 2 Swab. & T. 160.

<sup>10</sup> *Dismukes v. Dismukes*, 1 Tenn. Ch. 266; *Cameron v. Cameron*, 2 Coldw. 375.

<sup>11</sup> *Reid v. Reid*, 6 C. E. Green, 331.

<sup>12</sup> *Forster v. Forster*, supra.

in another was doubted.<sup>1</sup> And it was the clear doctrine of those courts that a defendant who sets up the plaintiff's adultery must prove it, to make good his bar.<sup>2</sup> Since a plaintiff who relies on the defendant's adultery is obliged to do no more than prove his case, there would appear to be little scope for this distinction. In the Divorce Court in England, this distinction seems to be utterly discarded.<sup>3</sup> In this country, the writer, who has read all the reported divorce cases, is unable to recall any one in which such a distinction was admitted. The New York Court has discarded it, holding that no less evidence is required to prove recriminatory adultery than any other.<sup>4</sup> It is not probable that the English ecclesiastical doctrine would now be accepted in any State wherein the burden of proof to establish the recriminatory charge is held to be on the defendant.<sup>5</sup>

§ 388. Fifthly. *Ill conduct for which the law has provided only the limited divorce will bar a suit to dissolve the marriage.*

§ 389. Why? — Most of the reasons assigned for the preceding propositions sustain equally the present one. For example, the reason set down as "conclusive" under the second proposition<sup>6</sup> is of this sort. If a husband and wife bring their several complaints before a court, and the proof is that he is guilty of cruelty entitling her to a divorce from bed and board, and she of adultery entitling him to a dissolution of the marriage, and the statutes

<sup>1</sup> Chettle v. Chettle, 3 Phillim. 507. Denied in Derby v. Derby, 6 C. E. Green, 36, 60.

<sup>2</sup> Stone v. Stone, 3 Notes Cas. 278; Goodall v. Goodall, 2 Lee, 384. "It must be manifest that if once the guilt of the husband be established, the *onus probandi* shifts; and if he seeks to deprive her of her remedy by imputing a charge of criminality of any kind, he should make good that charge by evidence which admits of no dispute." Dr. Lushington, in Turton v. Turton, 3 Hag. Ec. 338, 350, 5 Eng. Ec. 130, 136.

<sup>3</sup> Sopwith v. Sopwith, 2 Swab. & T. 160, 164 et seq. "It is certainly," said the learned judge ordinary in this case, "a startling proposition that if an issue be joined as to the same identical fact, a different amount of evidence is necessary to sustain the issue according as the averment of that fact is made by the plaintiff or defendant."

<sup>4</sup> Pollock v. Pollock, 71 N. Y. 137, 141. And see Price v. Price, 9 Abb. Pr. n. s. 291.

<sup>5</sup> In New Jersey, a wife defended the husband's divorce suit for her adultery by a charge of the same against him. To sustain her allegation, she adduced proof of his admission that when in New York City, and intoxicated, he had met a girl named Ella; coupled with the fact that he had called out her name in his sleep, or when partly intoxicated and half asleep. And it was held in the first instance and sustained on appeal that though these circumstances might arouse suspicion, they fall short of the required proof. Flavell v. Flavell, 5 C. E. Green, 211, 7 C. E. Green, 599. And in Cummins v. Cummins, 2 McCarter, 138, the court evidently deem it necessary to prove the recriminatory charge by the same weight of evidence as the direct.

<sup>6</sup> Ante, § 370; post, § 396.

and unwritten law have simply provided certain consequences to follow the decree in his favor, and certain different consequences to follow that in her favor, resulting in two contradictory decrees not possible to stand together, the court has no more power to render the one decree than the other. It cannot choose the one and reject the other. It cannot pronounce for both; because, the two being antagonistic, both would be void. It has no alternative but to make neither decree. Again, —

§ 390. **Another Marriage.** — One who has so violated matrimonial duties as to justify the court in suspending the cohabitation, is not a fit person to ask for a dissolution of the present marriage that he may enter into another. Not only does he not stand *rectus in curia*, but he is not in a condition to avail himself of the consequences of a dissolution. As to which, Sir John Nicholl, speaking in the Ecclesiastical Court to a question of recrimination under the former English law, which gave judicial divorces only from bed and board, said: "Whether such a husband, morose, severe, inattentive, negligent, should be entitled to a special legislative interference, dissolving the marriage, and enabling him to marry again, is quite a different question, and rests upon very different principles; but his conduct does not amount to a legal bar to a sentence *a mensa et thoro*." <sup>1</sup> And in our own country it has been deemed that the restricted rules of the ecclesiastical courts in the separation suit are not applicable to ours for dissolution; because, when the prayer is for the limited divorce, there may be reasons for granting it — as, to save a husband from being charged with a spurious issue, or the support of an adulterous wife — which would be overbalanced by other reasons if the divorce were from the bond of matrimony. Dissolutions of the marriage have reference to a second marriage; and he who would ask this privilege should have discharged properly the duties of the first. <sup>2</sup>

§ 391. **Parliamentary Practice.** — The English Parliament, in

<sup>1</sup> Rogers v. Rogers, 3 Hag. Ec. 57, 5 Eng. Ec. 13, 21.

<sup>2</sup> Wood v. Wood, 5 Ire. 674. See also Moss v. Moss, 2 Ire. 55; Foy v. Foy, 13 Ire. 90; Whittington v. Whittington, 2 Dev. & Bat. 64, 75. In the case last cited, Ruffin, C. J. said: "The divorce from the bonds of matrimony is not to be granted merely because one or both of the parties wish it. It ought to be granted only in the extreme case where the conduct of

one party is such that they ought not to and cannot live together, and the other party has been and was up to the time of the conduct complained of willing and ready and proceeding in the performance of the duties appropriate to that party." These North Carolina decisions may have been in a degree influenced by the statute, which authorizes in some circumstances a divorce from the bond of matrimony or from bed and board at the court's discre-

granting bills dissolving the marriage, while not bound by absolute law has still an established practice, which has "become as much the law of Parliament as the practice of the courts below constitutes the law of those courts."<sup>1</sup> According whereto, on a petition charging adultery, not only is adultery a bar in recrimination,<sup>2</sup> but plainly cruelty is also, though no exact decision on this question is now before the author. But where a petitioning husband, able to support his wife, had lived apart from her many years without making for her any provision, the House of Lords refused the divorce though she was a common prostitute; because he had neglected her, cast her upon the world without caring what became of her, and allowed her nothing for maintenance.<sup>3</sup> These

tion. See *Conant v. Conant*, 10 Cal. 249, 70 Am. D. 717. Vice-Chancellor McCoun once observed: "I am convinced it is the duty of this court to hold a strict hand over the proceedings, and not to grant a decree which is to absolve" the parties "from their marriage vows, except where the complaining party is entirely innocent, and is really aggrieved by the misconduct of the other, and seeks the relief which the law affords from a sincere desire to avoid a greater shame." *Hanks v. Hanks*, 3 Edw. Ch. 469. See also *Christianberry v. Christianberry*, 3 Blackf. 202, 25 Am. D. 96; *Ryan v. Ryan*, 9 Misso. 539. In *Sloan v. Cox*, 4 Hayw. 75, it was in substance said "that a divorce from bed and board is no bar to the defendant's right to bring a suit against the plaintiff for divorce from the bond of matrimony on the ground of adultery afterward committed." But this was not the question in issue.

<sup>1</sup> Lord Brougham, in *Moffat's Case*, Macq. Parl. Pract. 658, 660.

<sup>2</sup> *Bland's Case*, *Ib.* 605.

<sup>3</sup> *Simmons's Divorce Bill*, 12 Cl. & F. 339. In the more recent *Batley Divorce Case*, a newspaper report only of which I have seen, "the Lord Chancellor at the conclusion of the evidence said: This was a case in which he felt it to be his duty to move that the second reading of the bill be postponed to allow the house time for further consideration. There was no evidence whatever to affect the wife's character previous to her marriage. Then, with respect to the alleged deception

[about her parentage] which had been practised, it must be in the first place remarked that Batley had been guilty of deception towards her, in representing, when they were married, that he was of full age, when it was shown that he was a minor. He had married her with the full knowledge of her mode of life and means of livelihood. [She had supported herself before marriage by needlework.] He had been a visitor at the house, and had, therefore, the means of ascertaining her character previous to the marriage. He, the Lord Chancellor, was not going to justify the subsequent conduct of the woman,—for it could not be justified,—but what were the probable consequences of the desertion of the wife by her husband but those which had followed? Deserted by her husband, she is compelled to apply to a magistrate, who makes an order for an allowance of 7s. a week. She received, therefore, only a shilling a day from the man for whom she had given up her business, throwing herself out of employment, and the means of obtaining an honest livelihood, to place herself under the protection of a husband who for reasons wholly unsupported by evidence, deserted her at the end of one short week. The motion for the postponement of the second reading of the bill was then agreed to, and the house adjourned." In another case the application for divorce was refused; the Lord Chancellor, Truro, observing that "the husband had left his wife at a period when according to the evidence he had no reason to suspect her

doctrines were established at a time when, in England, desertion and neglect were not grounds for separation or divorce. But—

§ 392. **With us**,—who in most of the States recognize more causes for divorce, there is less occasion for departing from the reasonable doctrine before explained,<sup>1</sup> that only such misconduct as may be the foundation for some sort of divorce will bar the suit. Thus,—

§ 393. **Disobedience in Bar of Cruelty**.—On a wife's suit to dissolve the marriage for her husband's cruelty, the jury affirmed the truth of her allegations, except the one wherein she claimed to have been a dutiful wife; but the court held, nevertheless, that she was entitled to the divorce.<sup>2</sup>

§ 394. **Desertion in Bar**.—Desertion, to be good in bar, must have continued the number of years required by law to make it ground for divorce. When it has, it is adequate.<sup>3</sup>

§ 395. *Sixthly. In a dissolution suit for whatever cause, any conduct for which the law provides the same consequence will be adequate in bar, whether otherwise of the same sort or not.*

§ 396. **Why?**—The reasons for this doctrine have already in this chapter been pretty thoroughly ventilated under other heads. Thus, following a line of exposition stated in two preceding sections,<sup>4</sup> if the law is not so, we have this perplexing state of things, that cross-suits may be brought, resulting in both parties being entitled to prevail; then, if dissolution decrees are rendered in favor of both, each is the guilty and each the innocent party under statutory and unwritten laws which leave to the innocent and to the guilty, after the divorce, different rights, duties, and pecuniary interests. The law, in most of our States, has no pro-

of any guilt or impropriety, and he never looked after her nor furnished her with anything beyond these two wretched sums of 5*l.* each. There was no explanation as to why he had separated from his wife; and when they did separate, he ought to have shown some regard for her by taking care that she had means for her support." *Llewelyn's Divorce Bill*, 1 Macq. Ap. Cas. 280, 282.

<sup>1</sup> Ante, § 381 et seq.

<sup>2</sup> *Thatcher v. Thatcher*, 17 Ill. 66. **Recrimination in Illinois**.—The common doctrines of recrimination seem not to prevail in this State. It was said in one case: "We do not think his [the hus-

band's] desertion can exonerate the wife for the more serious charge of adultery. Neither that, nor drunkenness, nor cruelty, will, under our statute, constitute a sufficient recriminatory defence to a charge of adultery." *Bast v. Bast*, 82 Ill. 584, 585. **Minnesota**.—Something like this seems also to be the law in Minnesota. *Buerfening v. Buerfening*, 23 Minn. 563.

<sup>3</sup> *Wilson v. Wilson*, 40 Iowa, 230; *Hall v. Hall*, 4 Allen, 39; *Dupont v. Dupont*, 10 Iowa, 112, 74 Am. D. 378; *Clapp v. Clapp*, 97 Mass. 531.

<sup>4</sup> Ante, § 370, 389.



vision for the decree in favor of one of the parties to give way to that in favor of the other. There is a dead lock. And when this occurs, the movements of the court in the cause cannot do otherwise than stop. The cause cannot proceed to a decree. And this result shows, as distinctly as though the legislature had used the exact words, that the bar must be good; since, if it is not, the statutory and common-law provisions concerning collateral things can have no effect.<sup>1</sup> As to —

§ 397. **The Adjudged Cases.** — A part of the cases cited to the preceding sections expressly hold this doctrine, though the reasoning may not be precisely in this form.<sup>2</sup> And there are others which, united to them, establish it so satisfactorily and completely as general American law that any further particularization is unnecessary.<sup>3</sup> There are exceptional States in which this doctrine is rejected, or received only in part.<sup>4</sup> Various statutory expressions have been deemed to favor the one conclusion or the other; as, —

§ 398. **"Innocent and Injured Party."** — A statute declared that, for certain offences enumerated, the "innocent and injured party" might have a divorce from the bond of matrimony; adding, in another section, that when "both parties have been guilty of adultery, then no divorce shall be decreed." Thereupon the judges interpreted the latter provision by the former, and the whole by the reason of the entire law, so denied the divorce whenever both were guilty of any of the enumerated offences. As observed in one case: "It cannot, with reference to the rights of the injured party, be said that adultery is a more heinous offence, or one of greater moral turpitude, than others enumerated in the act; for the effect of each is the same, as they severally entitle the party

<sup>1</sup> See also, on this matter, *Cooper v. Cooper*, 7 Ohio, 238; *Tarbell, Petitioner*, 32 Me. 589; *Stilphen v. Houdlette*, 60 Me. 447; *Dejarnet v. Dejarnet*, 5 Dana, 499.

<sup>2</sup> Ante, § 368, 378.

<sup>3</sup> *Dunbar v. Dunbar*, Wright, 286, in connection with Page on Div. 240; *Clapp v. Clapp*, 97 Mass. 531; *Edgerly v. Edgerly*, 112 Mass. 53; *Hale v. Hale*, 47 Tex. 336; *Wilson v. Wilson*, 40 Iowa, 230; *Morrison v. Morrison*, 142 Mass. 361, 56 Am. R. 688; *Handy v. Handy*, 124 Mass. 394; *Haines v. Haines*, 62 Tex. 216; *Hub-*

*bard v. Hubbard*, 74 Wis. 650; *Beck v. Beck*, 63 Tex. 34; *Spahn v. Spahn*, 12 Abb. N. Cas. 169; *Hoff v. Hoff*, 48 Mich. 281; *Peck v. Peck*, 44 Hun, 290; *Pease v. Pease*, 72 Wis. 136; *Conant v. Conant*, 10 Cal. 249, 70 Am. D. 717; *Handy v. Handy*, 124 Mass. 394; *Shackett v. Shackett*, 49 Vt. 195. And see *Adams v. Adams*, 2 C. E. Green, 324.

<sup>4</sup> *Bast v. Bast*, 82 Ill. 584; *Buerfening v. Buerfening*, 23 Minn. 563; *Richardson v. Richardson*, 4 Port. 467, 478, 30 Am. D. 538.

injured to a divorce." Again: "The whole act evidently contemplates the innocence of the party obtaining a divorce. With what propriety could the court divorce a husband from his wife because of desertion on her part, when she had been driven to abandon her home because of the cruel and barbarous treatment of the husband? Or how shall the court determine which is the 'innocent and injured party,' where the evidence establishes the fact that the wife has been addicted to habitual drunkenness for the space of two years, and then the husband has been guilty of adultery? Which party has a right to apply to the court to set aside and vacate the marriage contract, when both parties have been guilty of a breach thereof?" Thus the question was disposed of in Missouri.<sup>1</sup> In Pennsylvania, under a like statute, the Supreme Court, overruling the Common Pleas, deemed that the specific provision for the case of mutual adultery excluded the general right, therefore held that a recriminatory plea of adultery was not good in bar of a divorce suit for desertion.<sup>2</sup> The Missouri decision appears to rest on the better reason.

### III. *How where the Recriminatory Wrong has been condoned.*

§ 399. **Three Opinions.**—On the question whether or not a condoned offence is available in recrimination, there are three differing opinions; namely, that it is, that it is not, and that it is or not according to the circumstances. Thus,—

§ 400. **Lord Stowell**,—speaking in the English Ecclesiastical Court to a case of aggravated recriminatory adultery condoned, seemed to deem the condonation not to remove the bar, though he did not regard the decision of the question as required by the facts. He said: "A man, it is true, who has forgiven adultery, cannot bring a suit; but when he complains of his wife, will her forgiveness of his previous misconduct make him a proper person to receive the sentence of the court? Does her act bind the court? If both are equally guilty, will her condonation make him

<sup>1</sup> Nagel v. Nagel, 12 Misso 53; Ryan v. Ryan, 9 Misso. 539; Hoffman v. Hoffman, 43 Mo. 547.

<sup>2</sup> Ristine v. Ristine, 4 Rawle, 460. Desertion partly justifiable.—This case is authority also for a still more questionable doctrine; namely, that desertion con-

tinued for the statutory period is sufficient for divorce, though during the later part of the time it was justifiable by reason of the deserted party having subsequently thereto committed adultery. The contrary of this was laid down in Massachusetts. Clapp v. Clapp, 97 Mass. 531.

*rectus in curia*, and enable him to procure a sentence? There may be cases where a wife may, by forgiveness, by cohabitation, by the reformation of the husband, be so barred that an obsolete fact shall not be a defence.<sup>1</sup> . . . It is said that condonation is favored because it induces the parties to live together again; but here the effect would be to separate them, to shut the door more completely against a return; here, if the court does not pronounce a sentence of separation, is no impossibility of a return.”<sup>2</sup>

§ 401. **Dr. Lushington**,—in a subsequent case wherein the adultery of a defending wife was very profligate, and the husband had many years before been guilty of a single act which she had forgiven, granted the divorce. He proceeded much on the special facts,<sup>3</sup> yet he employed language somewhat variant from Lord Stowell’s, thus: “Where a condonation has taken place, with a full knowledge of the facts, it is said to be a conditional forgiveness. Conditional on what? On the future conduct of the husband. Suppose he fulfils the condition, and never after violates the obligation of the marriage bed, is the condonation to have no other effect than to bar a suit against him? I think the effect is to make him *rectus et integer*, except that his past transgression may be revived by subsequent misconduct.”<sup>4</sup>

§ 402. **Cresswell, J.**,—later, in the English Divorce Court, followed Dr. Lushington’s decision, deeming the question settled by it, the observation of Lord Stowell being only *dictum*.<sup>5</sup>

§ 403. **In Dissolution Suits**,—under the English divorce statutes, recrimination is, we have seen,<sup>6</sup> a mere discretionary bar. The court, in the exercise of the discretion, will sometimes give effect to the recriminatory matter though condoned, sometimes not.<sup>7</sup>

§ 404. **With us**.—The New York Court, while uncontrolled by statute, held that condonation removes or not the recriminatory bar according to the circumstances of the particular case.<sup>8</sup> But

<sup>1</sup> Ante, § 322. And see *Jones v. Jones*,

<sup>3</sup> C. E. Green, 33, 90 Am. D. 607.

<sup>2</sup> *Beeby v. Beeby*, 1 Hag. Ec. 789, 797,

<sup>3</sup> Eng. Ec. 338, 342.

<sup>8</sup> Vol. I. § 111.

<sup>4</sup> *Anichini v. Anichini*, 2 Curt. Ec. 210, 219, 7 Eng. Ec. 85, 89.

<sup>5</sup> *Seller v. Seller*, 1 Swab. & T. 482. See, however, *Goode v. Goode*, 2 Swab. & T. 253.

<sup>6</sup> Ante, § 357–362.

<sup>7</sup> *Goode v. Goode*, 2 Swab. & T. 253; *Stoker v. Stoker*, 14 P. D. 60; *Story v. Story*, 12 P. D. 196; *Rose v. Rose*, 7 P. D. 225, 8 P. D. 98.

<sup>8</sup> *Wood v. Wood*, 2 Paige, 108; *Morrell v. Morrell*, 1 Barb. 318; s. p. *Goode v. Goode*, 2 Swab. & T. 253.

by the Revised Statutes, the judge is to refuse the decree "when it shall be proved that the complainant has also been guilty of adultery *under such circumstances as would entitle the defendant, if innocent, to a divorce.*" And the construction is that condonation always takes off the effect of the bar.<sup>1</sup> The same was, without a statute, laid down in New Hampshire, yet on no great consideration; in a case, however, where the recriminatory adultery was committed by the defendant's procurement.<sup>2</sup> Where, in New Jersey, a husband's adultery has been forgiven for years,<sup>3</sup> it will not take away his right of redress for unrestrained profligacy of the wife.<sup>4</sup>

§ 405. **In Principle**,—we have the following: When a matrimonial offence is condoned, the party forgiven stands upright as to the other party, so long as he commits no breach of the condition<sup>5</sup> on which all condonations proceed. This places the one forgiving under no new liberty to do evil; but if the condoned offence still operates as a recriminatory bar, the forgiving party practically obtained a license for himself when suffering the condonation to pass. And surely any construction of either a common-law or a statutory rule, the effect of which is to license profligacy, or other ill conduct in the matrimonial relation, is to be avoided. Hence, in principle, a condoned offence is not an adequate bar in recrimination.

#### IV. *The Distinction between the Law and the Evidence.*

§ 406. **In General**.—Not often will any difficulty arise under this head. The foregoing discussions are almost wholly of the law in distinction from the evidence: thus, it is a question of law, not of fact, whether or not a particular act alleged will bar the

<sup>1</sup> *Morrell v. Morrell*, supra. But in a subsequent stage of this case, the court without deciding the question put some pertinent queries whether the true construction had been given to the statute. "The circumstances meant," observes Sill, J. "are undoubtedly absence of procurement or connivance, or anything else which would involve the other party directly or indirectly in the guilt of the act. But it seems to us that condonation and lapse of time (where they have trans-

pired) cannot appropriately, and within the meaning of the statute, be taken as the circumstances under which the party is guilty. They have no connection with the commission of the offence." *Morrell v. Morrell*, 3 Barb. 236, 241.

<sup>2</sup> *Masten v. Masten*, 15 N. H. 159.

<sup>3</sup> Ante, § 208, 213.

<sup>4</sup> *Jones v. Jones*, 3 C. E. Green, 33, 90 Am. D. 607.

<sup>5</sup> Ante, § 269, 308-323.

particular suit. The jury have simply to find that the act was, or not, committed.

### V. *The Evidence.*

§ 407. **In General.**—The applicant for divorce must so prove his case as not, at the same time, to show a bar. Thus,—

§ 408. **Plaintiff's Guilt appearing.**—If, while he establishes the defendant's guilt, his own recriminatory offending appears also from his evidence, he cannot have the divorce.<sup>1</sup>

### § 409. *The Doctrine of this Chapter restated.*

The term “recrimination,” while not absolutely unknown in the other departments of our civil and criminal jurisprudence, is almost peculiar to divorce law. But the thing itself—the refusing of redress to a plaintiff who is himself at fault in that whereof he complains—is a familiar and fundamental principle in our entire legal system. Marriage creates reciprocal duties. And for certain breaches of them, commonly specified by statutes, the injured party may have a divorce absolute or partial. But if one has committed a breach of this sort, he cannot conformably with the principles of our jurisprudence have a divorce for the other's violation. To bring a case within this rule, it is not sufficient that the plaintiff simply lacks the perfections which we attribute to angels, his wrong must be such that but for the other's wrong he would be liable to be himself either partially or fully divorced. Yet it is immaterial that his offending is ground only for the divorce from bed and board, while the defendant's justifies dissolution. If, as is common, the terms of the divorce statute are general, and both parties appear to be entitled to divorce, yet if the law makes the resultings from the divorce different when it is given to the one from what they are when it is given to the other, the necessary consequence is that neither can have it; for in these circumstances the double sentence would be a nullifying contradiction.

<sup>1</sup> *Timmings v. Timmings*, 3 Hag. Ec. 76, 5 Eng. Ec. 22.

## CHAPTER XII.

## DELAY AND INSINCERITY.

§ 410, 411. Introduction.

412-429. Delay.

430-436. Insincerity.

437. Doctrine of Chapter restated.

§ 410. **Blending.**—Often in divorce cases, different defences are in the particular instance found to blend. Especially and commonly are the two of Delay and Insincerity. Therefore they are here combined in one chapter, yet for convenience and distinctness we shall look at them separately; thus,—

§ 411. **How Chapter divided.**—We shall consider, I. Delay; II. Insincerity.

I. *Delay.*

§ 412. **Two Principles**—of natural justice, combining, result in the doctrine of this sub-title. They pervade our entire jurisprudence. The one is that no man shall suffer for his goodness or forbearance; the other, that vigilance and care concerning one's rights shall be rewarded. They so differ in their natures, and it is so difficult to estimate their comparative force, that except from analogies to actual decisions we cannot always forecast what the ruling under a particular combination of facts should be. Yet for practical purposes the doctrine itself is fairly well established by adjudications; namely,—

§ 413. **Defined.**—Under the unwritten law, and aside from statutes such as the English Divorce Act,<sup>1</sup> and in some of our States limitations statutes, delay, standing quite alone, nothing combining with it and nothing of fact being inferred from it, is not a bar to the divorce suit.<sup>2</sup> But in the circumstances of a par-

<sup>1</sup> Ante, § 357; *Cooke v. Cooke*, 3 Swab. & T. 126, 138, 146; *Newman v. Newman*, Law Rep. 2 P. & M. 57; *Mason v. Mason*, 7 P. D. 233, 8 P. D. 21.

<sup>2</sup> *M. v. D.* 10 P. D. 75, 77; *Mackenzie v. Mackenzie*, 11 Scotch Sess. Cas. 4th ser. 105; *Johnson v. Johnson*, 50 Mich. 293.

ticular case, there may be, and where the delay is very long there commonly is, an inference of what will constitute a bar; such as insincerity, condonation, a probability of the existence of some now unknown latent defence, or of proofs too defective or liable to mislead to be prudently acted upon in behalf of one whose best excuse is that he has been indifferent to his own rights. So that,—

§ 414. **Indirect Effect.** — Operating thus indirectly, delay may defeat the suit, especially where the husband is complainant; though, when the wife prosecutes, it can rarely, while yet sometimes it may,<sup>1</sup> produce this consequence.<sup>2</sup> Lord Stowell, in a husband's suit, explained as follows: "The first thing which the court looks to when a charge of adultery is preferred, is the date of the charge relatively to the date of the criminal fact charged and known by the party; because if the interval be very long between the date and knowledge of the facts and the exhibition of them to this court, it will be indisposed to relieve a party who appears to have slumbered in sufficient comfort over them; and it will be inclined to infer either an insincerity in the complaint, or an acquiescence in the injury, whether real or supposed, or a condonation of it. It therefore demands a full and satisfactory explanation of this delay, in order to take it out of the reach of such interpretations."<sup>3</sup> But since the doctrine of condonation<sup>4</sup> and the rules of evidence as to connivance<sup>5</sup> do not in all respects apply the same to the wife as to the husband, observations like these can have little relevancy to her suit.<sup>6</sup> To illustrate,—

§ 415. **Husband not taking Steps.** — If a man for a considerable time sees his wife living in open adultery, and does nothing either to prevent it or to obtain a divorce, he is presumed to have forgiven the past and to acquiesce in the present, and he cannot succeed in his suit.<sup>7</sup> It was so held where the husband had lain by twenty years while the wife was living with another man to

<sup>1</sup> Post, § 425.

<sup>2</sup> *Ferrers v. Ferrers*, 1 Hag. Con. 130, 4 Eng. Ec. 354, and the cases stated in the notes; *Dysart v. Dysart*, 1 Rob. Ec. 470, 541, 542; *Angle v. Angle*, 1 Rob. Ec. 634, 642; *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 334. See *Williamson v. Parisien*, 1 Johns. Ch. 389; *Williamson v. Williamson*, 1 Johns. Ch. 488; *Stokes v. Stokes*, 1 Misso. 320; *Boulting v. Boulting*, 3 Swab. & T. 329; *Clark*

*v. Clark*, 97 Mass. 331. As illustrative, see *Allen v. Urquhart*, 19 Tex. 480.

<sup>3</sup> *Mortimer v. Mortimer*, 2 Hag. Con. 310, 313, 4 Eng. Ec. 543, 545.

<sup>4</sup> Ante, § 284, 286, 307.

<sup>5</sup> Ante, § 230, 239, 245.

<sup>6</sup> See *Angle v. Angle*, 1 Rob. Ec. 634, 640, 641.

<sup>7</sup> Ante, § 238, 241, 242; *Whittington v. Whittington*, 2 Dev. & Bat. 64.

whom she was married. And a shorter period would ordinarily suffice.<sup>1</sup> But —

§ 416. **Wife not taking Steps.** — The same presumption would not arise against a wife whose husband was living in adultery with another woman.<sup>2</sup> Yet in New Hampshire, where, in cruelty, the acts complained of transpired eight years prior to the institution of the wife's suit, it was deemed necessary that some occasion should be shown for the delay.<sup>3</sup>

§ 417. **The Special Facts** — of each case, therefore, should be inquired into in explanation of any delay which *prima facie* appears. Thus, —

§ 418. **Cohabiting or not.** — If, during the delay, the parties were cohabiting, it would be difficult to say there was not a condonation;<sup>4</sup> if they were not cohabiting, the English doctrine would be as against the wife deduct the interval of non-cohabitation.<sup>5</sup> Again, —

§ 419. **Changed Conditions** — (**Husband interfering with Wife**). — A delay may be explained by showing that at first there was no practical necessity for taking steps, but the conditions were afterward changed, and thereupon the party applied for judicial help. So, for example, it is where, in the language of Green, Ch., after the wife has been "living in a state of separation from her husband in silent submission to her wrongs," he "shall disturb her peace by an attempted exercise of his marital rights." In the case wherein this was said, she was granted her divorce after a lapse of nine years.<sup>6</sup> Likewise in an English case, where, after a separation nearly as long, during which the wife was allowed access to her children, she brought her suit for divorce on her husband's withdrawing this concession, she was held not to be barred by the delay. Said the learned judge ordinary, whose opinion was confirmed by the full court on appeal: "She abstained for reasons that may well be imagined from bringing her wrongs before the public, and was content to submit to the separation rendered necessary [by the husband's cruelty], provided he would allow her

<sup>1</sup> Williamson v. Williamson, 1 Johns. Ch. 488; Stuart v. Stuart, 47 Mich. 566. And see Valteau v. Valteau, 6 Paige, 207.

<sup>2</sup> Angle v. Angle, 1 Rob. Ec. 634, 642; D'Aguilar v. D'Aguilar, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 333; Johnson v. Johnson, 50 Mich. 293. See Reed v. Reed, 52 Mich. 117, 50 Am. R. 247.

<sup>3</sup> Fellows v. Fellows, 8 N. H. 160; Smith v. Smith, 43 N. H. 234.

<sup>4</sup> Ante, § 289-300.

<sup>5</sup> D'Aguilar v. D'Aguilar, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 334. And see Doan v. Doan, 3 Pa. Law Jour. Rep. 7.

<sup>6</sup> Cummins v. Cummins, 2 McCarter, 138, 143.



the consolation of having sometimes the society of her children. That consolation was afterwards withdrawn; she could no longer have it unless she returned to cohabitation with her husband. No part of his conduct or his letters since the separation evinced any more kindly feeling towards her; and therefore I believe she was sincerely afraid of further violence, and in order to obtain that to which as a wife and mother she was entitled, and which she could only have by returning to a cohabitation that was dangerous or by an appeal to this court, she adopted the latter course." And she was deemed to be justified in so doing.<sup>1</sup> Further as to which, —

§ 420. **Grievance real or not.** — In these two cases, the wife's sincerity in bringing the divorce suit appears in their special facts. And thus we have a key to the whole doctrine; namely, that a great delay must in some way be accounted for, or it will bar the suit; because, in the absence of explanation, the court will not meddle with what the party complaining showed by his conduct through a considerable series of years to be no grievance.<sup>2</sup>

§ 421. **Offence not known — (Adultery).** — If the offence is, like adultery, of a nature to be committed by one of the parties unknown to the other, such want of knowledge excuses the delay equally whether the complaint comes from the husband or the wife.<sup>3</sup>

§ 422. **Want of Funds** — may prevent a husband from proceeding for his wife's fault; whereupon, if he afterward has them, his suit will not be lost by the delay.<sup>4</sup> In making which ruling, Dr. Lushington explained the whole doctrine; thus, —

§ 423. **Delay and Reasons therefor.** — "The husband," said this learned judge, "ought to proceed with such celerity as the case permits of, to obtain the remedy he seeks; but I conceive it is also settled that if any circumstances occur which reasonably prevent him from proceeding, he is not thereby debarred from doing so at a time more convenient to him."<sup>5</sup>

§ 424. **In Nullity Suits — (Impotence).** — It is believed that the doctrine of delay in nullity suits will in some degree vary with

<sup>1</sup> *Cooke v. Cooke*, 3 Swab. & T. 126, P. & M. 57; *Schonwald v. Schonwald*, 139, 246, 247. Phillips, Eq. N. C. 215.

<sup>2</sup> *Boulting v. Boulting*, 3 Swab. & T. 329; *Harrison v. Harrison*, 3 Swab. & T. 362; *Newman v. Newman*, Law Rep. 2

<sup>3</sup> *Clark v. Clark*, 97 Mass. 331.

<sup>4</sup> *Cood v. Cood*, 1 Curt. Ec. 755, 6 Eng. Ec. 452.

<sup>5</sup> *Ib.* at p. 762, 455.

the ground of nullity. For impotence, therefore, we have some rules nearly special, but their consideration is postponed till we reach the chapter on that subject.<sup>1</sup>

§ 425. **Insanity** — (**Wife's Suit -- Husband's**). — In Alabama, a wife's nullity suit by reason of the husband having been insane when married was held to be barred by her delay under the following facts. "These parties," said Stone, J., "were married in 1826. Six years afterwards, in 1832, Mrs. Rawdon had notice that Mr. Rawdon was insane. She slumbered on her known rights twenty-two years, and filed this bill in 1854. Courts of equity, for the peace of society, discourage antiquated and stale demands, and acting on this inherent doctrine refuse to interfere where there has been a long acquiescence. . . . Lapse of time is a bar to relief in this case; and the parties, as to the property, must be left to their remedies at law if they have any."<sup>2</sup> And elsewhere it has been held that after more than thirty years from the time of a marriage, and while there is living a family of children, a suit will not be entertained to declare it void on the ground of the wife's insanity when celebrated.<sup>3</sup>

§ 426. **Statutes of Limitation**, — in the mere ordinary words common in our States, are not extended by interpretation to suits for divorce.<sup>4</sup> But there are States wherein, by express terms, they limit the period within which, after a matrimonial offence is committed or discovered, the dissolution or separation suit must be brought.<sup>5</sup> Some of these statutes apply also to nullity suits.<sup>6</sup> They operate absolutely, leaving no discretion in the court.<sup>7</sup> Where knowledge of the offence is an element of the bar, the party who relies thereon must prove it.<sup>8</sup> Under a New York statute making the limitations period five years after knowledge, Chancellor Walworth said: "If the complainant knows that his wife has contracted a second marriage and continues openly to cohabit with such second husband, or that she is living in open and continued adultery with another person even without the usual form of a marriage, the right to file a bill for a divorce for

<sup>1</sup> Post, c. 41.

<sup>2</sup> Rawdon v. Rawdon, 28 Ala. 565, 568. As to an Alabama statute of limitations, not affecting this case, see Smedley v. Smedley, 30 Ala. 714, 716.

<sup>3</sup> Secor v. Secor, 1 MacAr. 630.

<sup>4</sup> Mosely v. Mosely, 67 Ga. 92.

<sup>5</sup> As to Alabama, Smedley v. Smedley, 30 Ala. 714, 716.

<sup>6</sup> Kaiser v. Kaiser, 16 Hun, 602.

<sup>7</sup> Moulton v. Moulton, 2 Barb. Ch. 309.

<sup>8</sup> McCafferty v. McCafferty, 8 Blackf. 218.

such adultery will be barred after the expiration of five years, although such cohabitation or adulterous intercourse is continued down to the time of the commencement of the suit. And where such continued adultery is open and notorious, the complainant must also satisfy the court that by reason of his absence from the country, or otherwise, he was not aware of the fact of such continued cohabitation and adultery until within five years from the time of the commencement of the suit.”<sup>1</sup> There being likewise in this State a provision that for force or fraud in procuring a marriage it may be annulled *during the lifetime of the parties or one of them*, the two enactments were construed together,<sup>2</sup> thus requiring the suit to be brought while one of them is living within the five years’ period of limitation.<sup>3</sup>

§ 427. **Under the English Divorce Act**,—we have seen,<sup>4</sup> the court may in its discretion withhold a dissolution decree when the applicant shall “have been guilty of unreasonable delay in presenting or prosecuting” his petition. The delay meant has been construed to be, in the words of Wightman, J., of a sort “which would show the petitioner to have been insensible to the loss of his wife, and might almost be said to be equivalent to condonation.”<sup>5</sup> Yet, on the other hand, it has been laid down that even a wife is not permitted to wait an indefinite time before commencing proceedings. Simply the lapse of two years, in her case, was held to require explanation.<sup>6</sup> Want of funds may be sufficient in excuse;<sup>7</sup> so may be the inadmissibility of essential evidence which, by a change in the law, becomes afterward admissible.<sup>8</sup> As to—

§ 428. **Separations by Divorce Court**.—Where the proceeding in the Divorce Court is for a judicial separation, the old rules prevail. Yet in a wife’s suit for cruelty the judge ordinary observed: “I cannot agree that the lapse of time is immaterial; if at the

<sup>1</sup> Vallean v. Vallean, 6 Paige, 207.

<sup>2</sup> Bishop Stat. Crimes, § 86.

<sup>3</sup> Montgomery v. Montgomery, 3 Barb Ch. 132.

<sup>4</sup> Ante, § 357.

<sup>5</sup> Pellew v. Pellew, 1 Swab. & T. 553, 555. In this case, the delay was held not to be a bar; also in Tollemache v. Tollemache, 1 Swab. & T. 557, 561. Contra, in part, as to the result, Matthews v. Matthews, 1 Swab. & T. 499, affirmed,

<sup>3</sup> Swab. & T. 161. And see cases cited ante, § 413.

<sup>6</sup> Nicholson v. Nicholson, Law Rep. 3 P. & M. 53.

<sup>7</sup> Ib.; Short v. Short, Law Rep. 3 P. & M. 193, in which case, the proof of this want failed to satisfy the court, as, see p. 196.

<sup>8</sup> Wilson v. Wilson, Law Rep. 2 P. & M. 435.

time there had been any serious apprehension of further violence on the part of the husband, I cannot but suppose that means would have been found to claim the protection of the Ecclesiastical Court. Still I have no proof before me of any indirect motive for the present proceeding, and do not by any means treat the lapse of time as a bar." And he granted her prayer, though the cruelty had been committed in 1848, and the decision was in 1861.<sup>1</sup>

§ 429. **In Parliamentary Divorces.** — By the practice of the English Parliament in granting divorce bills, delays in the preliminary steps and in the final application are taken into the account, yet any reasonable explanation will avoid the bar. In one case, poverty being the excuse, the petitioner had his divorce though sixteen years had passed since the adultery was committed.<sup>2</sup> In another, the complaining husband had brought promptly his suits for damages and for divorce from bed and board, but had permitted five years from the time of the elopement to elapse before he applied to Parliament; yet the delay was deemed to be sufficiently accounted for by the wife's absence in America, and his inability by reason of his affliction to attend to any business.<sup>3</sup> In another case, the discovery of the adultery was in August, 1804, and the divorce act was passed in June, 1814. No explanation was given of the delay. In another, the wife was delivered of an illegitimate child in March, 1830, and in the following October the husband came to England and inquired into the matter. The divorce act was passed in 1839; the delay was not accounted for. In another, the wife's adultery was in 1820, but not known till 1830, when the adulterer was dead. The husband instituted his suit in the Ecclesiastical Court in 1832; the divorce act was passed in 1839. As partly accounting for the delay, there was some evidence of the husband's poverty. In another case, the adultery was in 1829; the divorce act, in 1840. There was, in this case also, some evidence of the husband's poverty. In another case, the commission and knowledge of the adultery were in 1829, and the divorce act was in 1840. There was evidence of poverty at first, but in 1832 it had ceased; thus leaving an

<sup>1</sup> Smallwood v. Smallwood, 2 Swab. & T. 397, 401. See also Brown v. Brown, Law Rep. 3 P. & M. 202.

<sup>2</sup> Martin's Divorce Bill, 1 H. L. Cas. 79.

<sup>3</sup> Heaviside's Divorce Bill, 12 Cl. & F. 333.

interval of eight years unexplained. In some other cases the delay was less.<sup>1</sup>

## II. *Insincerity.*

§ 430. **Elsewhere.** — Under the foregoing sub-title something of the doctrine of insincerity appears, and further on we shall again examine it under the title Impotence.

§ 431. **Deceiving the Court.** — Our judicial tribunals sit to promote justice and to transact the real business of the country. Any deceit in a proceeding avoids it; besides which, in many cases it subjects the party practising it to punishment. For example, —

§ 432. **Fictitious Suit.** — To bring a fictitious action in order to obtain a judicial opinion on a question of law is a contempt of the court,<sup>2</sup> subjecting the participators to punishment, and in proper circumstances to a dismissal also of their suit.<sup>3</sup> Within this principle, —

§ 433. **Doctrine defined.** — If one institutes a divorce suit, not from a desire for the redress which he asks, or acting under the weight of the grievance which he alleges, but to attain some collateral end, the law characterizes his conduct as insincerity, and withholds from him the decree which he prays, however much the defendant may be in the wrong. More minutely, —

§ 434. **Further, in Reason.** — Looking at this doctrine in the light of reason, should a husband not really desiring divorce sue his wife to give her trouble, or injure her reputation, or accomplish any other incidental purpose, he ought to be sent out of court. But one who desires the divorce, not having connived at or condoned the offence, cannot in justice be barred of his remedy because he was of a different mind a few years ago. Of course, if he has long slumbered over his rights, the court should inquire the more diligently whether he has not also remitted them, and should examine the more carefully the evidence of their original existence. Yet mere slumbering over rights, or wakeful thoughts

<sup>1</sup> I have extracted these cases from a note attached to the above report of Heaviside's Divorce Bill.

<sup>2</sup> *Coxe v. Phillips*, Cas. temp. Hardw. 237; *Henkin v. Guerss*, 12 East, 247; s. c. at N. P. nom. *Henkin v. Gerss*, 2 Camp. 408; *Dillon v. S.* 6 Tex. 55.

<sup>3</sup> *Brewster v. Kitchin*, Comb. 424; *Brown v. Leeson*, 2 H. Bl. 43; *Fletcher v. Peck*, 6 Cranch, 87, 147, 148; *Hoskins v. Berkeley*, 4 T. R. 402. And see *Good v. Elliott*, 3 T. R. 693, 697.

of them while lingering affection holds back the hand from which the blow might fall, ought not to bar the remedy afterward sincerely sought. Now,—

§ 435. **More of Ulterior Motives — Collateral Objects.** — As well apparently within the adjudications as the reasons of the law, if a plaintiff wishes the divorce he asks, it can be no objection that he would not wish it under other circumstances; as, that he would not were it not to relieve himself from the support of a delinquent wife, or to marry again, or to put his character right in the community. And we have seen<sup>1</sup> that a wife is not barred though her object is to gain access to her children, but for which she would not seek the divorce. So, in England, prior to the statutory restrictions on the suit for the restitution of conjugal rights, it appears commonly to have been brought, not from the real purpose of renewing cohabitation, but to force money from the defendant, to gain access to children, or something else equally foreign to a matrimonial dwelling together; yet, the decree being really wished for, the collateral motive did not bar the proceeding.<sup>2</sup> Plainly there was here something very like the insincerity of the law, but as the substance of what the law gives was sought, the applicant was not turned out of court, though he was in other cases not greatly different. Thus,—

§ 436. **Illustrative Case — (Impotence).** — Where a wife sued for a decree of nullity on the ground of the husband's impotence, twenty-five years after the marriage was solemnized and twenty-one years after the cohabitation ceased, Bramwell, B., said: "Here it is suggested that the petitioner lived with the respondent four years; endeavored to get him to take her back; has always been willing to go back, and only sues now because he refuses to maintain her; that she is in truth not complaining of the marriage and seeking to get rid of it because it is a grievance to her, but complaining because her husband will not maintain her. I think that is not so; I think these circumstances only show that she would not complain of the marriage if he would live with her or maintain her; but that, as he will not, she does not only in form but in substance complain of it, and seeks to get rid of what is to her a grievance. It is as though a person took possession of my land, and I forbore to complain as long as he gave me a

<sup>1</sup> Ante, § 419.

<sup>2</sup> Scott v. Scott, 4 Swab. & T. 113; Besant v. Wood, 12 Ch. D. 605.

compensation; when he ceases to do so, I make my true complaint." Still under the special facts the majority of the court, contrary to the opinion of this learned judge, held that the bar of insincerity should prevail.<sup>1</sup> And the House of Lords on appeal unanimously sustained the decision.<sup>2</sup>

§ 437. *The Doctrine of this Chapter restated.*

The defences considered in this chapter are in a certain sense numerous and distinct, while in another sense they are one. They are all traceable to the one principle that the courts sit to administer the law's justice, and not any other, to applicants asking it because they desire it, and not because they wish for something else which the law has not provided for them. And when for any reason the real case is outside of the law's justice, its remedy of divorce will be denied. In the absence of limitations statutes, one's mere waiting long before bringing his divorce suit does not take away his right; but in the circumstances of a particular case it may, as showing that the divorce is not the thing he is really after, or that because of some fact presumable from the delay, as seen in the lights special to it, the law is not on his side.

<sup>1</sup> H. v. C. 1 Swab. & T. 605, 619.

186. See *Kirrigan v. Kirrigan*, 2 Mc-

<sup>2</sup> *Castleden v. Castleden*, 9 H. L. Cas. Carter, 146.

## CHAPTER XIII.

## OTHER DEFENCES.

§ 438. **In the Foregoing Chapters** — of the present Book are included substantially all the defences which have not a more appropriate place in other parts of these volumes. Therefore this chapter is not strictly necessary, but it will direct the reader's attention to what might otherwise be overlooked. The defences remaining are both general and special; the leading ones are —

§ 439. **Marriage invalid.** — It is a mere axiomatic proposition that there can be no divorce where there is no marriage. And any defect entering into a formal marriage, whereby it becomes void or voidable, may be shown in defence of a suit for divorce founded on such marriage. The defences of this sort are explained in the third Book of the first volume. Again, —

§ 440. **Justification or Excuse for Delinquency.** — In the facts of a particular case, the matrimonial wrong relied on for a divorce may find an excuse or justification. And this sort of defence is always available to the party accused. Thus, —

§ 441. **In Adultery,** — a defending wife may show that the act complained of was committed under a mistake of facts, or was otherwise involuntary, or that it proceeded from her insanity,<sup>1</sup> or the coercion of her husband.<sup>2</sup>

§ 442. **In Cruelty,** — a defending husband may show such ill conduct or other provocation from the wife as, under the circumstances of the particular case, renders ill conduct of his, otherwise adequate for a divorce, inadequate.<sup>3</sup> Or his ill conduct may be proper matter for consideration, while yet not affording an absolute bar.<sup>4</sup>

<sup>1</sup> Vol. I. § 1507-1515.

<sup>3</sup> Vol. I. § 1641-1647.

<sup>2</sup> *Coleman v. Coleman*, Law Rep. 1 P. & M. 81, 83, 84.

<sup>4</sup> *Orme v. Orme*, 2 Add. Ec. 382; *Rowe v. Rowe*, 4 Swab. & T. 162, 163.



§ 443. **In Desertion,**—it is good in defence that an abandonment *prima facie* sufficient was in law justifiable.<sup>1</sup> Of course, not all wrongful conduct is of this sort, or is adequate in degree.<sup>2</sup>

§ 444. **In Conviction for Crime**—as ground of divorce, it is a defence that the convict has been pardoned.<sup>3</sup>

§ 445. **Articles of Separation**—constitute the subject of a chapter in the first volume,<sup>4</sup> and their effects in connivance<sup>5</sup> and condonation<sup>6</sup> have been explained in this one. In the absence of special matter in them, they are not a bar to any form of the suit for divorce,<sup>7</sup> or for alimony without divorce.<sup>8</sup> There seems to be a partial exception to this in Maryland, not generally recognized, it is believed, in the other States, to the extent that if one seeks a divorce from bed and board, while there are articles of separation which place the parties substantially where the judicial decree would do, he cannot have the useless relief.<sup>9</sup> The general doctrine is believed to be that no separation *in pais* is even a substantial equivalent for a judicial one, hence none will bar the suit.

§ 446. *The Doctrine of this Chapter restated.*

Any facts showing that the ground alleged for a divorce and *prima facie* proved, does not exist, are available to the defendant; since they overturn the plaintiff's case. Hence they are called defences.

<sup>1</sup> Vol. I. § 1735-1770.

<sup>2</sup> Reid v. Reid, 6 C. E. Green, 331.

<sup>3</sup> Vol. I. § 1807.

<sup>4</sup> Vol. I. § 1260-1312.

<sup>5</sup> Ante, § 243, 244.

<sup>6</sup> Ante, § 288, 331.

<sup>7</sup> Vol. I. § 1271, 1272, 1282, 1300, 1302, 1306; Rogers v. Rogers, 4 Paige, 516, 27 Am. D. 84.

<sup>8</sup> Miller v. Miller, Saxton, 386.

<sup>9</sup> Brown v. Brown, 5 Gill, 249, 2 Md. Ch. 316.

## BOOK X.

## THE GENERAL PROCEDURE.

## CHAPTER XIV.

## THE ECCLESIASTICAL PRACTICE AND ITS INFLUENCE ON OURS.

- § 447. Introduction.
- 448-459. Ecclesiastical Practice epitomized.
- 460-465. Its Influence on our Practice.
- 466. Doctrine of Chapter restated.

§ 447. **How Chapter divided.** — We shall consider, I. What in Brief Outline is the Ecclesiastical Practice; II. What has been the Influence of this Practice on Ours.

I. *What in Brief Outline is the Ecclesiastical Practice.*

§ 448. **The Purpose** — of this sub-title is not to set out in full detail the ecclesiastical practice, but to present such an outline of it as will enable the reader to understand the English reports, and will in a measure indicate the effect of any peculiarity of it upon the divorce practice of his own State.<sup>1</sup> Some particular questions will be considered in connection with the various elucidations further on.

§ 449. **Plenary and Summary.** — There are two kinds of proceeding known in the ecclesiastical courts,—the plenary and the summary.

§ 450. **The Divorce Suit,** — while those tribunals had the jurisdiction of it, was always in form plenary, but the collateral things connected therewith were summary.

<sup>1</sup> Vol. I. § 112, 113, 138, 139; *Saunders v. Saunders*, 1 Rob. Ec. 549.

§ 451. **Names of Pleadings.** — The first pleading in a divorce suit — namely, the plaintiff's complaint and prayer — was termed the "libel;" in a summary proceeding it was called an "act on petition," — a common name also for the summary suit itself. In a plenary cause, all the pleadings whether of the promoter or the respondent, subsequent to the libel, are denominated "allegations;" and in some of the ecclesiastical suits other than matrimonial, even the first pleading instead of being termed a libel is, like each subsequent one, called an allegation.<sup>1</sup> But the word "plea," though less technical than "allegation," is often employed, in the opinions of the courts, to denote the allegation.

§ 452. **The Answer** — is not an allegation or pleading. Not even, like the answer in equity, is it a plea in part. More nearly corresponding to a witness's answer to an interrogatory, the personal answer, which is the common sort, is the sworn-to response of the answering party, who may be either promoter or respondent, to the other's allegation, the word "allegation" here meaning as well the libel as a subsequent pleading. It is for the sole benefit of the person requiring it, and in respect only of evidence. One admitting a fact in his answer may therein also explain it; but if the explanation consists of a fact not already appearing in the pleadings, he must likewise set forth such fact in an allegation.<sup>2</sup> It is important to bear in mind this meaning of "answer;" since otherwise one familiar with equity proceedings may be led into misapprehension.<sup>3</sup>

§ 453. **How many Allegations — Amendments.** — It is said that each party is entitled to three successive allegations, but no more, — "each supporting and strengthening the preceding." And: "The promovant, having received light from the pleading of the impugnant, amends his bill, to use a phrase familiar to the equity lawyer, that is, he files a second allegation (for this part of the proceeding may be more justly compared to those in the equity courts than in those of law), and in the same manner he may file a third; but he can go no further." In like manner, "the defendant or impugnant has also a right to put in three defensive pleadings."<sup>4</sup>

<sup>1</sup> It is so in a testamentary suit. In a criminal suit in the ecclesiastical courts, the allegation corresponding to the libel is called the "articles."

<sup>2</sup> *Saunders v. Saunders*, 1 Rob. Ec. 549.

<sup>3</sup> And see, as to this, *Morgan v. Hopkins*, 2 Phillim. 582. And see *Maxwell v. Maxwell*, Milward, 290, 298, 299.

<sup>4</sup> *Law's Forms*, 179, 180. And see *Roper v. Roper*, 3 Phillim. 97; *Lambert v.*

§ 454. **The Contestation.** — The meaning of the term “*contestation*,” and the ecclesiastical practice relating to it, are not stated in the books in a way quite satisfying to an outside inquirer. Occurring before the full and final joinder in issue, while yet the pleadings are incomplete, it still appears to be a sort of preliminary tendering and accepting of issue.<sup>1</sup> “Contestation of suit is the foundation and corner-stone of every plenary ecclesiastical cause, without which all the proceedings are null.” “Contestation immediately causes the proctors on both sides to become lords of the controversy, or masters of the suit.” “Contestation of a suit cannot take place unless the plaintiff, or his proctor, is present in court.” “The plaintiff, or rather the proctor of the plaintiff, on the day assigned for the defendant’s answer to the libel, should say, in presence of the said defendant or his proctor, ‘I pray an answer to the libel according to the terms of your assignation.’ Then the defendant, if he does not wish to contest suit negatively, should confess the libel by answering affirmatively and submitting to the judge and tendering payment of the taxed costs. This is often done in defamation causes. If, however, the defendant intends to contest suit negatively, he must make the following declaration: ‘Protesting against the libel for its too great generality, inapplicability, obscurity, nullity, and erroneous representations, I answer that the statements as contained in the said libel are not true, and therefore that the prayer of the said libel should not be granted. And therefore I contest suit negatively.’”<sup>2</sup> It is not necessary to copy more from the books on this question; but the reader will be interested to look into the work whence these extracts are taken, and read on from the place where they leave off. The work consists mainly of translations from Oughton; and undoubtedly the usages of the ecclesiastical courts have in modern times more or less changed as to these things.

§ 455. **Objecting to Admission of Allegation.** — On the tender of a libel or any other allegation, the opposing party may object to its admission in whole or in part. This objecting is in its

Lambert, 1 Curt. Ec. 6, 6 Eng. Ec. 264; Dew v. Clark, 2 Add. Ec. 102, 2 Eng. Ec. 242.

<sup>1</sup> In the civil and canon law, whence this proceeding originated, “a cause is said to be *contestata* when the judge begins to hear the cause, after an account of

the claims, given not through pleadings but by statement of the plaintiff and answer of the defendant.” Bouv. Law Dict. *Contestatio Litis*, referring to Calvinus, Lex.

<sup>2</sup> Law’s Forms, 173-175.

effect similar to a common-law or equity demurrer. The court may reject the allegation altogether, or order it to be reformed, or admit it; but its admission concludes nothing on the final hearing.<sup>1</sup> Dr. Lushington declared this to be "one of the most wholesome and beneficial usages which can prevail in any court." Though requiring much labor from the judges, it often ends the suit on mutually conceded facts, saving great expense to litigants.<sup>2</sup> When it does not, it so marks the bounds of the controversy as to avoid their going into useless proofs.<sup>3</sup>

§ 456. **Evidence** — (**Term probatory** — **Examining Witnesses**). — Ordinarily and as of course the evidence is in writing;<sup>4</sup> but, under conditions very special and not often occurring, the court may examine a witness orally at the hearing.<sup>5</sup> Two witnesses, or one and corroborating circumstances, are essential to "full proof;"<sup>6</sup> but otherwise the rules of evidence are the same in the ecclesiastical courts as in the ordinary ones.<sup>7</sup> It is taken as follows. After an allegation has been admitted, and the opposite party has made thereto his personal answer under oath,<sup>8</sup> and there has been assigned a period for proof, known as a "term probatory," wherein the party "is bound to procure all his evidence, unless cause can be satisfactorily shown for renewing the term, the proctor whose plea is to be substantiated produces his witnesses in succession before a surrogate, who administers the customary oath to each witness, and monishes him to attend to undergo his examination whenever he shall be required for such purpose. This is done in the presence of the other proctor."<sup>9</sup> The testimony is taken by an officer of the court commonly called an "examiner," or notary,

<sup>1</sup> *Molony v. Molony*, 2 Add. Ec. 249, 2 Eng. Ec. 291; *White v. White*, 2 Lee, 20, 6 Eng. Ec. 15; *Reeves v. Glover*, 2 Lee, 270, 6 Eng. Ec. 121; *Saunders v. Saunders*, 10 Jur. 143, 144; *Faussett v. Faussett*, 13 Jur. 688; *Nokes v. Milward*, 2 Add. Ec. 386, 2 Eng. Ec. 356, 359.

<sup>2</sup> *Croft v. Croft*, 3 Hag. Ec. 310, 5 Eng. Ec. 120, 121. And see *Montefiore v. Montefiore*, 2 Add. Ec. 354, 2 Eng. Ec. 340.

<sup>3</sup> *Evans v. Knight*, 3 Phillim. 413; *Richardson v. Richardson*, 1 Hag. Ec. 6, 3 Eng. Ec. 13; *Hitchings v. Wood*, 2 Moore P. C. 414; *Bird v. Bird*, 1 Lee, 531, 5 Eng. Ec. 441; *Watney v. Lambert*, 4 Hag. Ec. 89; *Meddowcroft v. Huguenin*, 3 Curt. Ec. 403, 411, 7 Eng. Ec. 438, 442.

<sup>4</sup> *Saph v. Atkinson*, 1 Add. Ec. 162, 195, 2 Eng. Ec. 64, 79.

<sup>5</sup> *Ingram v. Wyatt*, 1 Hag. Ec. 94, 105, 3 Eng. Ec. 42, 47.

<sup>6</sup> *Evans v. Evans*, 1 Rob. Ec. 165, 173; *Cole v. Corder*, 2 Phillim. 106; *Simmons v. Simmons*, 5 Notes Cas. 347; *Kenrick v. Kenrick*, 4 Hag. Ec. 136; *Compton v. Butler*, 1 Hag. Con. 460, 463; *Hutchings v. Denziloe*, 1 Hag. Con. 181, 182; post, § 773.

<sup>7</sup> *Conway v. Beazley*, 3 Hag. Ec. 639, 651, 5 Eng. Ec. 242, 248; *Saph v. Atkinson*, supra, at p. 213; *Sergeant v. Sergeant*, 1 Curt. Ec. 3, 5, 6 Eng. Ec. 262, 263.

<sup>8</sup> Ante, § 452.

<sup>9</sup> *Croote Ec. Pract.* 779.

who is strictly alone with the witness, no third person being present.<sup>1</sup> Having before him the allegation to sustain which the witness was called, he puts orally such questions as he deems adapted to draw out the truth upon each fact alleged, then writes down what the witness says. The party who made the allegation, and now undertakes to sustain it by the witness, does not tender written interrogatories; the articles of the allegation, thus used by the examiner, stand in their stead. But the other party has in the case, if he chooses, written interrogatories, which are put by the examiner to the witness.<sup>2</sup>

§ 457. **Further of Term Probatory and Testimony.** — It would appear that each of the allegations, whereof one is the libel, on the one side and on the other, has its term probatory, and its course of proofs generally, the same as though it alone constituted the whole case. So that the pleadings need not be finished before testimony on the earlier ones is taken. And —

§ 458. **Exceptive Allegations** — to the testimony of witnesses are in some circumstances permissible.<sup>3</sup>

§ 459. **Ancillary Allegations — (Faculties — Act on Petition).** — Besides the allegations to the principal matter, there may be ancillary ones; for example, in a divorce suit the “allegation of faculties,” wherein the faculties, or property and income, of the husband are set out. Then there is the already-mentioned<sup>4</sup> “act on petition,” which, when not signifying a summary proceeding, or the allegation with which it begins, denotes a step corresponding to a written petition or motion in a common-law or equity cause.<sup>5</sup>

## II. *What has been the Influence of the Ecclesiastical Practice on Ours.*

§ 460. **In the First Volume,** — in a chapter wherein we saw to what extent the law of the English ecclesiastical courts has be-

<sup>1</sup> *Herbert v. Herbert*, 2 Hag. Con. 263, 267, 268, 4 Eng. Ec. 534, 537; *Evans v. Evans*, 1 Hag. Con. 35, 95, note, 4 Eng. Ec. 310, 338, 339.

<sup>2</sup> And see *Holden v. Holden*, 1 Hag. Con. 453, 4 Eng. Ec. 452; *Ingram v. Wyatt*, supra. Further as to the duty of examiners, see *Evans v. Evans*, supra.

<sup>3</sup> *Burgoyne v. Free*, 2 Hag. Ec. 456,

482; *Maclean v. Maclean*, 2 Hag. Ec. 601, 4 Eng. Ec. 218; *Kenrick v. Kenrick*, 4 Hag. Ec. 114, 128; *Mynn v. Robinson*, 2 Hag. Ec. 169, 4 Eng. Ec. 72; *Lambert v. Lambert*, 1 Curt. Ec. 6, 6 Eng. Ec. 264; *Atkinson v. Atkinson*, 2 Add. Ec. 484, 2 Eng. Ec. 387.

<sup>4</sup> Ante, § 451.

<sup>5</sup> Wadd. Dig. 1.

come common law in our respective States, something appears on the subject of this sub-title.<sup>1</sup> Now, —

§ 461. **Principle — Actual Practice.** — Since we have no ecclesiastical courts, and our divorce jurisdiction is committed to those of common law and of equity, the explanations of the first volume show that we can have no general ecclesiastical practice. But they render it plain also that in those steps for which the particular tribunal has no adequate practice, it should adopt the ecclesiastical, either in its exact or in a reasonably modified form. In some of our States we have statutes which aid this conclusion; in others, we have those which in part or in full provide a practice inconsistent with, and therefore excluding, the ecclesiastical. As practically retarding it, we have the fact that during the formative period of our American practice we had no lawyers or judges trained in that of the ecclesiastical tribunals, and few or no books from which it could be ascertained. By reason whereof, the courts were compelled to a practice of their own, different in the common-law from the equity ones, and otherwise not uniform in the several States. To illustrate, —

§ 462. **The Injunction,** — familiar in equity yet unknown in the common-law tribunals, may be resorted to in divorce cases by courts having equity powers.<sup>2</sup> But there is no pretence that a mere common-law court could issue this process in a divorce litigation, without the aid of a statute, since it is unknown in the ecclesiastical practice. Again, —

§ 463. **Interrogatories** — between the parties, to be answered under oath, were allowable in the ecclesiastical courts; therefore they are permitted in the present English divorce practice, before a court which is not ecclesiastical.<sup>3</sup> But with us, under the general practice and statutes of a particular State, this may not be so; for example, in Indiana it was held that such interrogatories could not be employed.<sup>4</sup>

§ 464. **Affirmative Relief** — may be given a defendant in the ecclesiastical divorce practice; therefore in some of our States this, in one form or another, is permitted.<sup>5</sup> But commonly, it is

<sup>1</sup> Vol. I. § 138, 139, 147.

<sup>2</sup> *Gardner v. Gardner*, 87 N. Y. 14.  
And see *Black v. Black*, 5 Mont. 15.

<sup>3</sup> *Euston v. Smith*, 9 P. D. 57; *Harvey v. Lovekin*, 10 P. D. 122.

<sup>4</sup> *Simons v. Simons*, 107 Ind. 197.

<sup>5</sup> *Wuest v. Wuest*, 17 Nev. 217. And see *Wadsworth v. Wadsworth*, 81 Cal. 182; *Waltermire v. Waltermire*, 110 N. Y. 183.

believed, the ordinary equity or common-law practice so far prevails as to require for such relief a cross-bill or libel.

§ 465. **The Result** — of all is, that the ecclesiastical practice can be said to have had in divorce cases some influence on our own; but the extent of it differs in the States; in none of them is it very great, in some it is but slight, and on the whole there is no such uniformity in its effects as permits of anything more certain than is above written. Various other particulars will come under notice in future elucidations of this volume.

§ 466. *The Doctrine of this Chapter restated.*

The practice of every court is in some measure distinct from the substantive law it administers. We received the English divorce law as an inheritance from the mother country, but we had never her ecclesiastical courts; and their practice did not necessarily become that of the equity and common-law ones to which divorce jurisdiction was by us committed. At the same time, if in any particular the established practice of the newly endowed tribunal was inadequate to the due execution of the divorce law, such law could not therefore remain unexecuted; so that properly, justly, and perhaps of necessity the tribunal should follow in the particular matter the adequate ecclesiastical practice. And always the statutes in regulation of the practice must be obeyed the same as on other subjects.



## CHAPTER XV.

## THE THREE KINDS OF DIVORCE EXPLAINED AND DISTINGUISHED.

§ 467. **Elsewhere.** — The several diverse consequences of the different kinds of divorce will be stated in future chapters.

§ 468. **Three.** — In the larger meaning of the word “divorce,” as including the sentence of nullity, there are three sorts; namely, the one declaring that there was never a marriage; another, that there was a marriage, but by reason of the defendant’s offending it is dissolved; and another, that there was a marriage, and because of a like offending the parties are separated from bed and board.

§ 469. **Defined.** — Limiting ourselves now to the second and third of these three sorts, the first being more aptly termed nullity of marriage,<sup>1</sup> divorce is the dissolution or partial suspension by law of the marriage relation, the dissolution being termed divorce from the bond of matrimony, or, in the Latin form of the expression, *a vinculo matrimonii*; the suspension, divorce from bed and board, *a mensa et thoro*.

§ 470. **Distinguished.** — The divorce from the bond of matrimony puts an end to the marriage; that from bed and board authorizes the parties to live in separation, but leaves the marriage bond in full force.<sup>2</sup>

§ 471. **“Bed and Board” — “Separation.”** — The divorce from bed and board is sometimes called a “separation;”<sup>3</sup> leaving the term “divorce” to indicate merely the dissolution of a valid marriage. A change of phraseology was in England effected by the statute of 20 & 21 Vict. c. 85, § 7,<sup>4</sup> which provides that “no decree shall hereafter be made for a divorce *a mensa et thoro*, but in all cases

<sup>1</sup> Post, § 472, 473.

<sup>2</sup> *Clark v. Clark*, 6 Watts & S. 85, 2 Burn Ec. Law, Phillim. ed. 501 *l*; *Geils v. Geils*, 15 Scotch Sess. Cas. 2d ser. H. of L. 28; *Green v. Green*, Law Rep. 3 P. & M. 121.

<sup>3</sup> See the New York Reports generally. This is also the modern Scotch term, and the phrase “divorce *a mensa et thoro*” has entirely fallen into disuse in Scotland. <sup>1</sup> 1 Fras. Dom. Rel. 645, note.

<sup>4</sup> Vol. I. § 153, note.

in which a decree for a divorce *a mensa et thoro* might now be pronounced, the court may pronounce a decree for a judicial separation, which shall have the same force and the same consequences as a divorce *a mensa et thoro* now has.”

§ 472. **Sentence of Nullity defined.** — A sentence of nullity is a judicial declaration that a supposed marriage never had a legal existence, — applicable equally where it was originally void and where it was voidable. Still, —

§ 473. **Meaning of “Divorce.”** — Not unfrequently the judicial declaration of nullity is called a “divorce.” It is properly so where the marriage it declares void was only voidable. For example, it is common and correct in law language to speak of impotence as cause for *divorce*. And Blackstone writes that the “divorce *a vinculo matrimonii* must be for some of the canonical causes of impediment.”<sup>1</sup> But the expression “sentence” or “decree of nullity” equally well indicates the legal avoiding of a voidable marriage; and it seems more significant and less liable to be misunderstood than the other, and somewhat better in accord with modern usage.<sup>2</sup> Where the marriage, declared null, was void, the term “divorce” can hardly be deemed appropriate. This single word, standing unexplained in a judicial sentence, has been held to denote the ordinary divorce from the marriage bond, not from bed and board,<sup>3</sup> — a conclusion doubtless depending upon the particular system of divorce laws with reference to which the word is employed. It could not have been so in England at a time when all judicial divorces were from bed and board.

§ 474. **Party Electing — (Bed and Board).** — The statutes in most of our States specify the sort of divorce which shall follow each particular form of offending. And the court cannot grant a different divorce from that authorized; for example, from bed and board when the law directs the sentence to be from the bond of matrimony.<sup>4</sup> But in some of the States, for certain of the causes,

<sup>1</sup> 1 Bl. Com. 440. On the other hand, it has been said that “the civil and canonical disabilities which render the marriage contract either void or *voidable* are grounds for a proceeding for nullity of marriage, but *not*, correctly speaking, for a *divorce*.” Shelf. Mar. & Div. 365; Godol. Abr. 500.

<sup>2</sup> See Rogers Ec. Law, art. Divorce; Wadd. Dig. Ib.; Shelf. Mar. & Div. 182, 365; 1 Fras. Dom. Rel. 709.

<sup>3</sup> Miller v. Miller, 33 Cal. 353.

<sup>4</sup> Burlage v. Burlage, 65 Mich. 624. See Wagner v. Wagner, 36 Minn. 239.

it may be the one or the other at the election of the party applying for it.<sup>1</sup> So, under the English Divorce Act, one entitled to dissolution may have the judicial separation instead, if he prefers.<sup>2</sup> There may be a State or two wherein the partial divorce is, in some circumstances, an essential preliminary to the full.<sup>3</sup> And nowhere, it is believed, is one who has obtained the former precluded thereby from having the latter when able to show a sufficient cause.<sup>4</sup>

§ 475. **Court electing.** — There are States wherein the court, by an exercise of its discretion, determines whether the divorce shall be from bed and board or from the bond of matrimony. Not inquiring whether former laws have been repealed or not, it is or was so in North Carolina,<sup>5</sup> in Tennessee,<sup>6</sup> and in California.<sup>7</sup> The discretion meant is not an arbitrary but a sound and judicial one, founded on some reasonable and fixed principles.<sup>8</sup> In a North Carolina case the rule for it was intimated to be, that “although a divorce *a mensa et thoro* may be allowed in some instances to a person who is not entirely impeccable, who may not have been exemplary in all the attentions and stipulated offices assumed in contracting this relation, yet the policy of the law, the interest of the offspring, the tranquillity and happiness of families, in general forbid the dissolution of marriage at the suit of a person to whom default in any of the essential duties of married life can be fairly imputed.”<sup>9</sup> And the like was laid down in California.<sup>10</sup>

§ 476. **Limiting Time in Bed and Board** — (**Form of Sentence**). — It is said that the divorce of the ecclesiastical law may be either for a time or without limitation of time.<sup>11</sup> Yet commonly the sentence in form separates the parties “until they shall be reconciled to each other.”<sup>12</sup> In one or more of our States, the statute

<sup>1</sup> *Smith v. Smith*, 3 S. & R. 248; *Light v. Light*, 1 Watts, 263; *Coverdill v. Coverdill*, 3 Harring. Del. 13; *LeDoux v. Her Husband*, 10 La. An. 663.

<sup>2</sup> *Dent v. Dent*, 4 Swab. & T. 105; *Dent v. Dent*, Law Rep. 1 P. & M. 125; *Mycok v. Mycock*, Law Rep. 2 P. & M. 98.  
<sup>3</sup> *Savoie v. Ignogoso*, 7 La. 281; *LeDoux v. Her Husband*, *supra*. And see *Whitaker v. Strong*, 16 Ga. 81; *Gray v. Gray*, 15 Ala. 779, 783.

<sup>4</sup> *Geils v. Geils*, 15 Scotch Sess. Cas. 2d ser. H. of L. 28; *Green v. Green*, Law Rep. 3 P. & M. 121.

<sup>5</sup> *Collier v. Collier*, 1 Dev. Eq. 356;

*Whittington v. Whittington*, 2 Dev. & Bat. 64; *Moss v. Moss*, 2 Ire. 55.

<sup>6</sup> *Rutledge v. Rutledge*, 5 Sneed, 554.

<sup>7</sup> *Conant v. Conant*, 10 Cal. 249, 70 Am. D. 717.

<sup>8</sup> See Vol. I. § 1837.

<sup>9</sup> *Whittington v. Whittington*, *supra*; s. r. *Moss v. Moss*, *supra*. See also *Rutledge v. Rutledge*, 5 Sneed, 554; *Buckholts v. Buckholts*, 24 Ga. 238.

<sup>10</sup> *Conant v. Conant*, *supra*, p. 257, 258.

<sup>11</sup> 2 Burn Ec. Law Phillim. ed. 501 l; *Ayl. Parer*, 225; *Barrere v. Barrere*, 4 Johns. Ch. 187.

<sup>12</sup> *Poynter Mar. & Div.* 182, note;

empowers the court to make the separation perpetual or for a limited period in its discretion. Chancellor Kent, under the New York provision, deemed that as a general rule the reason and policy of the law will be best carried out by a decree in form for a perpetual separation, with leave to the parties at any time thereafter, by their mutually free and voluntary act, to apply to be discharged from the decree.<sup>1</sup>

§ 477. **The Procedure**—to obtain these differing sorts of divorce does not commonly, like the sentence, differ. Therefore mainly we shall in chapters to follow treat of the three sorts together, until we come to the places of divergence, and there we shall make the necessary separations.

§ 478. *The Doctrine of this Chapter restated.*

Through a procedure essentially the same, we have three differing forms of the divorce sentence, varying likewise in their collateral consequences; namely, nullity of a marriage originally imperfect, the divorce from the marriage bond, and the divorce from bed and board. Yet in a part of our States the last is unknown, and in England the name for it has been changed to “judicial separation.” Some other peculiarities appear in the differing statutes of the States.

Coote Ec. Pract. 347; Conset. 279; Clutch v. Clutch, Saxton, 474 (the New Jersey statute authorizing either form); Oughton, tit. 215.

<sup>1</sup> Barrere v. Barrere, 4 Johns. Ch. 187. Graecen v. Graecen, 1 Green Ch. 459; See Bedell v. Bedell, 1 Johns. Ch. 604; Coles v. Coles, 2 Md. Ch. 341.

## CHAPTER XVI.

## THE PUBLIC A PARTY TO THE DIVORCE SUIT.

- § 479. Introduction.
- 480-482. Doctrine in General.
- 483-488. Divorce Suit as Civil or Criminal.
- 489-497. Divorce Suit as Triangular.
- 498. Doctrine of Chapter restated.

§ 479. **How Chapter divided.** — We shall consider, I. The Doctrine in General; II. The Divorce Suit as Civil or Criminal; III. The Divorce Suit as Triangular.

I. *The Doctrine in General.*

§ 480. **Defined.** — Marriage being a public institution of universal concern,<sup>1</sup> and each individual marriage or its dissolution affecting the rights not only of the husband and wife but of all other persons,<sup>2</sup> the court sitting in a divorce cause should regard the public as a party thereto, and so far protect its interests as not to suffer the decree for dissolution or suspension to pass contrary to the real facts and justice of the case.

§ 481. **Otherwise stated.** — Divorce is allowed only for causes approved by law.<sup>3</sup> Therefore the parties cannot dissolve their own marriage, or validly agree to a suspension of the cohabitation under it.<sup>4</sup> Nor, for the same reason, can the courts modify or abrogate their conjugal relation simply from their consent.<sup>5</sup> So that when an attempt is made through the tribunals to do either, the public becomes in effect a party to the proceeding, not to oppose the divorce at all events, but to prevent the sentence passing except as justified by facts which the law has declared

<sup>1</sup> Vol. I. § 5, 38, 47, 52, 72, 73.

<sup>2</sup> Ante, § 98.

<sup>3</sup> Vol. I. § 39, 40, 55.

<sup>4</sup> Vol. I. § 55, 76, 1261, 1268, 1269.

<sup>5</sup> Vol. I. § 73, 75.

to be sufficient; "for," in the words of a learned English judge, "society has an interest in the maintenance of marriage ties, which the collusion or negligence of the parties cannot impair."<sup>1</sup>

§ 482. **In Matter of Form**, — the name Public or State does not appear with the names of the private parties in a divorce suit. And between private persons it is a sort of general rule that one not mentioned in a proceeding is not bound by the decree.<sup>2</sup> But this rule has little or no relevancy to the government, as representing the public interests; sometimes, and as to some things, when the State is interested, it appears in name, but this is not so universally. Thus, —

## II. *The Divorce Suit as Civil or Criminal.*

§ 483. **In Prosecutions for Crime**, — the State, with no private person joining, is both in name and in fact the plaintiff; and strictly that only is deemed a crime which is proceeded against in this form. Still this strict rule is more or less relaxed. There are many things which our books speak of as belonging rather to the criminal than to the civil department of the law, while yet the name of the State does not appear in controversies concerning them. And in the legal field, which in the main is divided into civil and criminal, there is a space of indefinite dimensions partly of the one and partly of the other.<sup>3</sup> Now, —

§ 484. **In England**, — the suit in the Ecclesiastical Court for the divorce from bed and board was in form civil.<sup>4</sup> Yet a sentence of nullity would be rendered, not alone in the civil suit for it, but likewise in the criminal one for incest;<sup>5</sup> even, in the latter, though the citation was silent as to the nullity.<sup>6</sup> In the Divorce Court, to which this jurisdiction was transferred, the suit is regarded rather as civil than criminal.<sup>7</sup> Still, even in the ecclesiastical tribunals it was sometimes spoken of as in effect criminal.<sup>8</sup>

§ 485. **With us**, — the form of the suit is always civil. Yet it has sometimes been said by our judges that, in the language of

<sup>1</sup> The Judge Ordinary in *Hall v. Hall*,  
<sup>3</sup> Swab. & T. 347, 349.

<sup>2</sup> *Landon v. Townshend*, 112 N. Y. 93,  
<sup>8</sup> Am. St. 712.

<sup>3</sup> 1 Bishop Crim. Law, § 32, 33.

<sup>4</sup> Ayl. Parer. 44.

<sup>5</sup> *Burgess v. Burgess*, 1 Hag. Con. 384;

Vol. I. § 265; Shelf. Mar. & Div. 175-183.

<sup>6</sup> *Chick v. Ramsdale*, 1 Curt. Ec. 34; *Blackmore v. Bridger*, 2 Phillim. 359; *Cleaver v. Woodridge*, cited Ib. 362.

<sup>7</sup> *Mordaunt v. Moncreiffe*, Law Rep. 2 H. L. Sc. 374.

<sup>8</sup> *Dillon v. Dillon*, 3 Curt. Ec. 86, 116.

one of them, "regulations on the subject of marriage and divorce are rather parts of the criminal than of the civil code, and apply not so much to the contract between the individuals as to the personal relations resulting from it, to the relative duties of the parties, and to their standing and conduct in the society of which they are members; and these are regulated with a principal view to the public order and economy, the promotion of good morals, and the happiness of the community."<sup>1</sup> Others have deemed this remedy purely civil; and Kent well observes that a divorce suit is a private prosecution, under the control of the party aggrieved, who may avail himself of it, or bar himself by his own act.<sup>2</sup>

§ 486. **Meaning of "Civil" — "Criminal."** — In a statute, these words, like many others, are liable to be bent in meaning by the connection in which they stand, and the subject to which they are applied. For example, an equity suit is "civil," in the large sense of the word, and as it is oftenest employed.<sup>3</sup> But the term "civil causes," in the Georgia Constitution of 1798, was held not to include a suit in equity.<sup>4</sup> In a jurisdictional statute, a grant to a court of authority over "civil" causes is commonly held to carry the divorce suit,<sup>5</sup> but it does not always.<sup>6</sup>

§ 487. **In Principle, Civil — Compared with Criminal.** — Though, dealing with public interests, a divorce suit is not a mere controversy between private parties, therein bearing a slight resemblance to a prosecution for crime, in reason it is essentially a civil proceeding. If the public were even a party of record, the suit would not necessarily, therefore, be criminal; for under the name State, People, or the like, the public often brings civil suits. Sometimes the divorce sentence is followed by a consequence partly penal, — as, where the offending party is forbidden remar-

<sup>1</sup> Sewall, J. in *Barber v. Root*, 10 Mass. 260, 265; *Dorsey v. Dorsey*, 7 Watts, 349; *Garrat v. Garrat*, 4 Yeates, 244; *Dickinson v. Dickinson*, 3 Murph. 327, 9 Am. D. 608; *Pollock v. Pollock*, 71 N. Y. 137, 142. And see *O'Bryan v. O'Bryan*, 13 Mo. 16, 21, 53 Am. D. 128.

<sup>2</sup> 2 Kent Com. 100; *Clark v. Clark*, 10 N. H. 380, 389, 34 Am. D. 165; *Humphrey v. Humphrey*, 7 Conn. 116; *Delliber v. Delliber*, 9 Conn. 233; *Westbrook v. Westbrook*, 2 Greene, Iowa, 598; *Herron v. Herron*, 16 Ind. 129; *Gilbert v. Thomas*, 8 Kelly, 575.

<sup>3</sup> *Kramer v. Rebman*, 9 Iowa, 114; *U. S. v. Cigars*, 1 Woolw. 123; *Rison v. Cribbs*, 1 Dil. 181. And see *S. v. Bottle of Brandy*, 43 Vt. 297.

<sup>4</sup> *Gilbert v. Thomas*, 3 Kelly, 575; *Rice v. Tarver*, 4 Ga. 571, 582.

<sup>5</sup> *Hurt v. Hurt*, 2 Lea, 176; *Ellis v. Hatfield*, 20 Ind. 101; *Musselman v. Musselman*, 44 Ind. 106; *Herron v. Herron*, 16 Ind. 129; *S. v. Smith*, 19 Wis. 531; *Evans v. Evans*, 105 Ind. 204.

<sup>6</sup> *Heatherwick v. Heatherwick*, 32 Ill. 73. And see *Ewing v. Ewing*, 24 Ind. 468; *Powell v. Powell*, 104 Ind. 18.

riage during the life of the other,<sup>1</sup>—but this does not necessarily render the proceeding criminal.<sup>2</sup> There are in some of our States statutes punishing adultery as crime, but there is no pretence that a divorce for it would bar an indictment, or that a conviction for any crime will exclude a divorce suit for the same act.<sup>3</sup> Further to particularize, —

§ 488. **Contract — Tort.** — Under the California Code of Civil Procedure, a divorce suit is deemed to be within provisions regulating the action of contract.<sup>4</sup> Probably this interpretation is justifiable upon a view of the entire statute. But looking at the question disentangled from complicated enactments, we have seen that marriage, as contemplated by the divorce laws, is a status, not a contract.<sup>5</sup> And even a contract may be the foundation for an action of tort.<sup>6</sup> Therefore a breach of marriage duties, such as authorizes divorce, is a civil tort, and the divorce suit is in essence an action of tort, though not technically known by this name.<sup>7</sup> Hence, —

### III. *The Divorce Suit as Triangular.*

§ 489. **Doctrine defined.** — A divorce suit is a civil proceeding, founded on a matrimonial wrong, wherein the married parties are plaintiff and defendant, and the government, or public, occupies without being mentioned in the pleadings the position of a third party, — resulting in a triangular and otherwise *sui generis* action of tort.<sup>8</sup> As to —

<sup>1</sup> Dickson v. Dickson, 1 Yerg. 110, 24 Am. D. 444; Vol. I. § 703 et seq.

<sup>2</sup> 1 Bishop Crim. Law, § 32; Clark v. Clark, 10 N. H. 380, 390, 34 Am. D. 165; Woart v. Winnick, 3 N. H. 473, 481, 14 Am. D. 384.

<sup>3</sup> Nash v. Nash, 1 Hag. Con. 140, 4 Eng. Ec. 357.

<sup>4</sup> Mott v. Mott, 82 Cal. 413.

<sup>5</sup> Vol. I. § 11.

<sup>6</sup> Bishop Non-Con. Law, § 4, 5, 72-78.

<sup>7</sup> See Mangels v. Mangels, 6 Mo. Ap. 481, 484. Fraser, after reviewing various opinions on the question whether the divorce suit is civil or criminal, says: "The proper view to take of the objections to the right of divorce seems to have been held to be to regard them, not as arising

from the will or consent of the parties, but as forming part of the public law of the country, established for the general good of the community, and therefore not subject to the compacts, express or implied, which are entered into by individuals." 1 Fras. Dom. Rel. 665. And see Ferg. note (F), p. 381, 3 Eng. Ec. 493; Ferg. p. 305, 306, 317, 3 Eng. Ec. 448, 455; Lord Brougham, in Warrender v. Warrender, 2 Cl. & F. 488, 537; Lord Stowell, in Evans v. Evans, 1 Hag. Con. 35, note, 4 Eng. Ec. 310, 338.

<sup>8</sup> Whittington v. Whittington, 2 Dev. & Bat. 64. And see Berthelemy v. Johnson, 3 B. Monr. 90, 38 Am. D. 179; Opinion of the Supreme Judicial Court, 16 Me. 481. "In this State," says the Editor



§ 490. **Counsel.** — This third party, the public, is not generally in our courts, nor was it in the ecclesiastical ones, represented by counsel; but —

§ 491. **The Court** — exercises a constant watchfulness over the public interests in the cause. It will, for example, itself examine a witness whenever such a course seems promotive of this end.<sup>1</sup> Said Cooper, Ch.: “In the earlier days of the republic, when there was a higher appreciation of the sanctity of the marital relation than now prevails, the judges took a part in the examination of the witnesses, not to aid the plaintiff in making out his case, but to prevent him from imposing on the court the semblance of truth for its reality. To this extent I reserve the right of intervening, but the parties seeking a divorce must make out the case according to the strict requirements of the law.”<sup>2</sup> Again, —

§ 492. **Prosecuting Officer.** — In a few of the States, — for example, Kentucky,<sup>3</sup> and Indiana,<sup>4</sup> — it is made by statute the duty of the public prosecuting officer to oppose all suits for divorce, at least to the extent of seeing that there is no collusion. So, —

§ 493. **Public Officer in Scotland.** — Under the former Scotch practice, the procurator-fiscal looked after the interests of the public in divorce causes, though both of the parties were likewise represented by counsel.<sup>5</sup> Later, the statute of 24 & 25 Vict. c. 86, § 8, makes it “competent to the Lord Advocate to enter appearance as a party in any action of declarator of nullity of marriage or of divorce; and . . . to lead such proof and maintain such pleas as he may consider warranted by the circumstances of the case; and the court shall, whenever they consider it necessary for the proper disposal of any action of declarator of nullity of marriage or of divorce, direct that it be laid before the Lord Advocate, in order that he may determine whether he should enter appearance therein; and expenses shall not be claim-

of McCord's South Carolina Statutes at Large, vol. 2, p. 733, “marriage is a civil contract, of mutual partnership and personal cohabitation during life, under the provisions of laws passed on this subject. The parties are the man, the woman, and the State. The State is interested, her interest being that the contract shall be fulfilled beneficially to the progeny, of whom the future citizens are to be composed.” For other definitions of marriage, see Vol. I. § 11 et seq.

<sup>1</sup> Haswell v. Haswell, 1 Swab. & T. 502, 504.

<sup>2</sup> Dismukes v. Dismukes, 1 Tenn. Ch. 266, 268.

<sup>3</sup> Stat. of Jan. 31, 1809, § 5; 1 Morehead & Brown's Dig. 123.

<sup>4</sup> R. S. of 1843, c. 35, § 69; R. S. of 1881, § 1038; Green v. Green, 7 Ind. 113; S. v. Brinneman, 120 Ind. 357.

<sup>5</sup> Ferg. 364, 373, 3 Eng. Ec. 482, 488; Tovey v. Lindsay, 1 Dow, 117, 134, 139.

able by or against the Lord Advocate with reference to such cases." To the writer, this seems to be an admirable provision, worthy of adoption in our country.

§ 494. **Queen's Proctor in England.**—We have already seen what is the present English law, as to the intervention of the Queen's Proctor, to detect collusion.<sup>1</sup>

§ 495. **More of Reasons — Interested Third Persons.**—The public interest in a divorce suit, already explained,<sup>2</sup> blends with that of various third persons not before the court.<sup>3</sup> Of such, for example, are the children, born or *en ventre sa mère*. Since they cannot protect themselves, the government, represented by the judge when not by an officer specially empowered, is under the duty to protect them. Particularly is this so in suits for nullity, which, when successful, make or declare the children illegitimate.<sup>4</sup> So that —

§ 496. **Conscience of Court.**—The judge, sitting in a divorce cause, deems himself under a sacred obligation to look after the interests of all who cannot be present, yet who may be prejudiced by the sentence prayed. And establishing the justice of the plaintiff's complaint, not merely as between the parties of record, but as between them and the community, including persons specially interested yet not before the court, is what is frequently termed satisfying the conscience of the court.<sup>5</sup> But —

§ 497. **Limits.**—The duties of the judge in these cases have their reasonable limits. For example, the public has no interest, which it desires to enforce, to compel one either to bring a divorce suit or to prosecute it when brought; so he may at pleasure dis-

<sup>1</sup> Ante, § 265; *Wilson v. Wilson*, Law Rep. 1 P. & M. 180; *Gladstone v. Gladstone*, Law Rep. 3 P. & M. 260; *Hudson v. Hudson*, 1 P. D. 65; *Sheldon v. Sheldon*, 4 Swab. & T. 75; *Harding v. Harding*, 4 Swab. & T. 145; *Pollock v. Pollock*, 4 Swab. & T. 266; *Alexandre v. Alexandre*, Law Rep. 2 P. & M. 164; *Clements v. Clements*, 3 Swab. & T. 394; *Bowen v. Bowen*, 3 Swab. & T. 530; *Palmer v. Palmer*, 4 Swab. & T. 143; *Chetwynd v. Chetwynd*, 4 Swab. & T. 151; *Butler v. Butler*, 14 P. D. 160; *Crawford v. Crawford*, 11 P. D. 150.

<sup>2</sup> Ante, § 480, 481.

<sup>3</sup> Vol. I. § 47; *Campbell's Case*, 2 Bland, 209, 235, 20 Am. D. 360; *Gould v.*

*Gould*, 2 Aikens, 180. "Marriage," says Lord Stowell, "is a contract formed with a view, not only to the benefit of the parties themselves, but to the benefit of third parties; to the benefit of their common offspring, and to the moral order of civil society. . . . There are undoubtedly cases for which a separation is provided; but it is lawfully decreed by public authority, and for reasons which the public wisdom approves." *Evans v. Evans*, 1 Hag. Con. 35, 4 Eng. Ec. 310, 349.

<sup>4</sup> *Wright v. Elwood*, 1 Curt. Ec. 662, 666. And see *Cross v. Cross*, 3 Paige, 139, 23 Am. D. 778.

<sup>5</sup> And see *Wolf v. Wolf*, *Wright*, 243; *Hall v. Hall*, 3 Swab. & T. 347, 349.

continue it or bar his right, except that he can do nothing of this sort in a way conflicting with public policy.<sup>1</sup>

§ 498. *The Doctrine of this Chapter restated.*

Marriage and divorce differ in the law from everything else. They have, therefore, their special rules. A divorce suit is as distinctly a controversy between private parties as an action for assault and battery or for the breach of a contract, but it is likewise more. It affects in a special way the interests of the entire community, and the separate private interests of considerable numbers of third persons not nominally parties. For the protection of those interests, the judge assumes that the public is a party, not in the sense of either asking or opposing the divorce, but as seeking justice for itself and for all interested private persons who are not before the court. And he looks after those interests as far as his other functions of administering judicial justice permit. In a few of the States, the prosecuting officer appears in the divorce cause for the protection of those interests, but such is not the common course in our tribunals.

<sup>1</sup> *Westmeath v. Westmeath*, 2 Hag Ec. Ec. 543, 547. And see Vol. I. § 1271, Supp. 1, 115, 4 Eng. Ec. 238, 291; *Mortimer v. Mortimer*, 2 Hag. Con. 310, 4 Eng. 1273.

## CHAPTER XVII.

## THE PARTIES OF RECORD AND INTERVENTIONS.

- § 499. Introduction.
- 500-512. Original Parties not under Disability.
- 513-515. Effects of Coverture, Infancy, Guardianship.
- 516-532. Insane Parties.
- 533-535. Interventions by Third Persons as Parties.
- 536. Doctrine of Chapter restated.

§ 499. **How Chapter divided.** — We shall consider, I. The Original Parties when not under Disability; II. The Effects of Coverture, Infancy, and Guardianship; III. Insane Parties; IV. Interventions by Third Persons as Parties.

*I. The Original Parties when not under Disability.*

§ 500. **Differences.** — The rules for parties, not speaking particularly of divorce causes, are not quite the same in courts of law and courts of equity; and the ecclesiastical tribunals, which in England had jurisdiction over divorce at the time when we received thence our unwritten law, had their own special rules for parties. With us, the divorce jurisdiction has in some States been committed to the courts of law, in others to those of equity, and in most of them the ecclesiastical practice has had some influence on the divorce practice.<sup>1</sup> Added to which, the question of parties in divorce causes is in many of the States more or less regulated by codes of procedure or other legislative commands, and by early practice grown into common law. The result of all which is that the practice in our States is not uniform, and in some particulars it remains in various States undetermined. Yet something on the subject will be of common benefit.

§ 501. **The General Rule,** — the exceptions to which will chiefly occupy us in this sub-title, may be stated to be that the libel,

<sup>1</sup> Ante, § 460-465.

whether for separation, dissolution, or nullity, must be brought by the one party to the real or supposed marriage against the other, and that no third persons can complain or respond in their stead, or be joined with them. At the same time, —

§ 502. **Third Persons in Interest.** — Though, in sound principle, no third person can command the dissolution of a valid marriage which is satisfactory to both the parties to it, there are circumstances wherein third persons have such an interest in a marriage or its dissolution, or in property which will be affected thereby, that they may justly claim or be properly compellable to be made defendants, and possibly in exceptional cases may be introduced as plaintiffs.

§ 503. **In the Ecclesiastical Practice,** — which is extremely flexible, even plaintiffs were admitted with a liberality exceeding anything usual in the ordinary tribunals. For example, while an infant husband was in India, the wife committed adultery in England. Thereupon his father in England applied, through counsel, to the court to appoint him the son's guardian to carry on in his behalf a divorce suit for this adultery. "He submitted that unless the court were to do so, great injury might be sustained by the husband, as the evidence of adultery might be lost." The court granted the prayer, but directed that the case should not proceed to judgment until the son approved and confirmed the proceedings.<sup>1</sup> But —

§ 504. **Third Person as Plaintiff with us.** — We have no American authority for instituting a divorce suit in this way.<sup>2</sup> And it is not believed that any of our courts would thus entertain the suit of a third person, even during its earlier stages, to procure the dissolution of a marriage where the injured party being competent had not in fact spoken. Still the practice may be different in the —

§ 505. **Nullity Suit.** — Though a third person, whatever his interest in a marriage, may not be entitled to compel the parties to dissolve it, the consequence does not follow that therefore he can in no case ask the court to decide whether or not an ostensible husband and wife are lawfully such. So that in England, equally under the ecclesiastical jurisdiction and that of the later Divorce Court, it was and is competent for any person interested

<sup>1</sup> *Morgan v. Morgan*, 2 Curt. Ec. 679. 122, 82 Am. D. 194; *D'Auvilliers v. Her*

<sup>2</sup> And see *Kimball v. Kimball*, 44 N. H. Husband, 32 La. An. 605.

in a marriage, while both the parties to it are living, yet not after the death of one of them,<sup>1</sup> to maintain in his own name a suit to have its nullity declared. For example, a father may thus procure a decree pronouncing null his son's or daughter's marriage, even when arrived at majority,<sup>2</sup> the ostensible husband and wife being made defendants;<sup>3</sup> and a sister can have her brother's marriage declared void as incestuous.<sup>4</sup> Further as to which, —

§ 506. **Void and Voidable distinguished — Impotence.** — There is in reason ground for a distinction, as to the right of a third person to a decree of nullity, between a void marriage and a void<sup>5</sup>able one, and more distinctly between the different sorts of voidable. Thus in a general way the third person's right to maintain the nullity suit extends to the voidable marriage, not being limited to the void.<sup>6</sup> A common illustration is an incestuous one,<sup>6</sup> or in England the marriage under undue publication of banns,<sup>7</sup> which, the reader will note, cannot by any satisfaction of the parties therein be cured of its defect. Therefore the case is within the reason which gives the right to the third person. But in the absence of a controlling statute, a marriage voidable for impotence<sup>8</sup> may be affirmed by the parties past annulment,<sup>9</sup> consequently there should be no right in any third person to bring a suit to declare this sort of marriage void.

§ 507. **Insanity — (Guardian).** — The marriage of an insane person is, according to the present author's defining, void.<sup>10</sup> But it is not a very inaccurate use of language to call it voidable, and so it is termed by some.<sup>11</sup> And with us it has been held that a court of equity will take jurisdiction to declare void the marriage of an imbecile on complaint of his guardian.<sup>12</sup> The suit, on this ground of insanity, may, it was deemed in North Carolina, be in the name of the guardian, or of the lunatic by him, as he may choose. But the latter was thought to be the better course; "because," said Ruffin, C. J., "upon suspending the commission [of guardianship] *pendente lite*, for the restoration of the

<sup>1</sup> Vol. I. § 264–266.

<sup>2</sup> Ray v. Sherwood, 1 Curt. Ec. 193; Sherwood v. Ray, 1 Moore, P. C. 353, 396, 400; Wells v. Wells, 3 Swab. & T. 593.

<sup>3</sup> Wells v. Cottam, 3 Swab. & T. 364.

<sup>4</sup> Faremouth v. Watson, 1 Phillim. 355.

<sup>5</sup> Vol. I. § 264–266.

<sup>6</sup> See cases cited to the last section.

<sup>7</sup> Wells v. Cottam, 3 Swab. & T. 364.

<sup>8</sup> Vol. I. § 790.

<sup>9</sup> Vol. I. § 758, 791, 792, 797.

<sup>10</sup> Vol. I. § 628.

<sup>11</sup> Vol. I. § 614–644.

<sup>12</sup> Waymire v. Jetmore, 22 Ohio St. 271.

party's reason, the case would be proceeded in without the necessity of a supplemental bill by the lunatic to procure the benefit of the proceedings as far as they had gone."<sup>1</sup> In like manner,—

§ 508. **Form of Father's Suit.**—A father's suit may, at his election, be in the name of the son whose marriage is to be declared void, by himself as guardian.<sup>2</sup> But—

§ 509. **Statutes—Signing Libel.**—In some of our States, there are statutes the effect whereof is to qualify or affirm the foregoing doctrines. Thus, some of these statutes, by their direct or interpreted words, require the libel to be signed by the libellant in person,<sup>3</sup>—the consequence whereof would seem to be that no third person can be libellant or plaintiff.

§ 510. **Joining Third Persons.**—In all the sorts of divorce suit, where the parties to the marriage are respectively plaintiff and defendant, third persons may, in exceptional cases and before some tribunals, be joined also as parties.<sup>4</sup> The limits of the doctrine, depending upon whether the suit is in a court of law or of equity, the particular statutes of the State, and the somewhat differing views of individual judges, cannot be defined by rule. To illustrate,—

§ 511. **Joining Fraudulent Grantee.**—If the suit is in equity and the wife is complainant, and if on prevailing she will be entitled to a share in her husband's estate or to alimony out of it, and she suspects him of having conveyed it in whole or in part to a third person to defraud her, she may join the third person as defendant.<sup>5</sup>

<sup>1</sup> *Crump v. Morgan*, 3 Ire. Eq. 91, 102, 40 Am. D. 447. See post, § 527.

<sup>2</sup> *Wells v. Cottam*, 3 Swab. & T. 364.

<sup>3</sup> *Philbrick v. Philbrick*, 27 Vt. 786; *Daniels v. Daniels*, 56 N. H. 219; *Gould v. Gould*, 1 Met. 382. **Signing Libel aside from Statute.**—While there was no statute on the subject, the court sustained a libel signed by attorney, on proof that the libellant authorized it, "but cautioned the bar against such a practice in future." *Willard v. Willard*, 4 Mass. 506. In another case, prior to the statute, a libel having been signed by the guardian of a spendthrift, "The court said it would be monstrous to dissolve a marriage upon such an application. It could not be known that the party ever gave his assent to the prosecution. If he is desirous of a divorce, and has sufficient

ground to obtain one, he must file his libel in his own name." *Winslow v. Winslow*, 7 Mass. 96. So, in Vermont, it is held that a spendthrift thus under guardianship may apply for divorce in his own name. *Richardson v. Richardson*, 50 Vt. 119.

<sup>4</sup> *Gibson v. Gibson*, 46 Wis. 449; *McGhee v. McGhee*, 2 Sneed, 221; *Sackett v. Giles*, 3 Barb. Ch. 204; *Uhl v. Uhl*, 52 Cal. 250; *Joyes v. Hamilton*, 10 Bush, 544; *Faulk v. Faulk*, 23 Tex. 653; *Damon v. Damon*, 28 Wis. 510; *Ruger v. Heckel*, 85 N. Y. 483; *Peck v. Uhl*, 66 Mich. 592; *Pearson v. Darrington*, 32 Ala. 227.

<sup>5</sup> *Monroy v. Monroy*, 1 Edw. Ch. 382; *Peck v. Uhl*, 66 Mich. 592; *Black v. Black*, 5 Mont. 15. And see *Varney v. Varney*, 54 Wis. 422.

But he cannot be the only one: the husband must be a defendant also; since the wife would have no claim against the third person "until she had established her right against her husband, which she could not do without making him a defendant."<sup>1</sup> And where the husband dies before the case against him is proved, the other defendant may have the bill dismissed.<sup>2</sup> Again,—

§ 512. **Joining other Claims against Husband.**—Where the wife's suit is in equity, and she has a double claim against her husband, for divorce and for separate property which he has squandered, she may put all into one bill. Speaking of the property, "it was," said Handy, J., "a right which she was entitled to enforce in some form. She could not assert it by an action at law, because she was incapable of suing him at law. Her remedy, then, for the recovery of her separate property was in equity, and no reason is perceived why she should not unite her several causes of complaint against her husband in one bill, instead of bringing two suits," &c. "It is justified by the equitable rule of preventing multiplicity of suits."<sup>3</sup>

## II. *The Effects of Coverture, Infancy, and Guardianship.*

§ 513. **Coverture — (Alone or by Next Friend).**—In some of the States, where the proceeding is in equity, the wife sues by next friend; in others, alone. So she defends alone in some States; in others, by next friend. The question is so far local to particular States that only some authorities need here be cited to it.<sup>4</sup> In the English ecclesiastical courts she always sued and defended in her own name alone,<sup>5</sup> and so in the later Divorce Court.<sup>6</sup>

<sup>1</sup> *Foster v. Hall*, 2 J. J. Mar. 546, 547; *McCrocklin v. McCrocklin*, 2 B. Monr. 370; *Kashaw v. Kashaw*, 3 Cal. 312. And see *Cropsey v. McKinney*, 30 Barb. 47.

<sup>2</sup> *Sackett v. Giles*, 3 Barb. Ch. 204.

<sup>3</sup> *Armstrong v. Armstrong*, 32 Missis. 279, 292. See *Wadsworth v. Wadsworth*, 81 Cal. 182.

<sup>4</sup> *Kenley v. Kenley*, 2 How. Missis. 751; *Hunt v. Booth*, Freeman, Missis. 215; *Richardson v. Richardson*, 4 Port. 467, 30 Am. D. 538; *Edwards v. Edwards*, 30 Ala. 394; *Schenck v. Ellingwood*, 3 Edw. Ch. 175; *Shore v. Shore*, 2 Sandf. 714;

*Meldora v. Meldora*, 4 Sandf. 721; *Knight v. Knight*, 2 Hayw. 101; *Ward v. Ward*, 2 Dev. Eq. 553; *Jelineau v. Jelineau*, 2 Des. Eq. 45; *Prather v. Prather*, 4 Des. Eq. 33; *Amos v. Amos*, 3 Green Ch. 171; *Kirby v. Kirby*, 1 Paige, 261; *Wood v. Wood*, 2 Paige, 108, 454, 8 Wend. 357; *Lawrence v. Lawrence*, 3 Paige, 267; *Rose v. Rose*, 11 Paige, 166; *Thomas v. Thomas*, 18 Barb. 149; *Peltier v. Peltier*, Harring. Mich. 19.

<sup>5</sup> *Herbert v. Herbert*, 2 Hag. Con. 263, 269, 4 Eng. Ec. 534, 538; *Coote Ec. Pract.* 320.

<sup>6</sup> *Browne Div.* 4th ed. 596, 597.



The same is believed to be the course in this country generally, in States where the proceeding is not distinctively in equity.<sup>1</sup>

§ 514. **Infancy.** — In ordinary civil suits, whether at law or in equity, an infant appears in court only by next friend or guardian.<sup>2</sup> And in the old Court of Chancery in New York, Walworth, Ch., held that though an adult wife may in her own name bring or defend a suit to dissolve her marriage, an infant wife, like a minor in any other cause, can appear only by guardian or next friend.<sup>3</sup> Contrary to this, it was afterward adjudged in Maine that an infant wife may sue for divorce in her own name alone without a next friend; the court deeming that the New York case proceeded on some local peculiarity, not on principles universally applicable. Still the Maine adjudication appears to have rested somewhat on statutes.<sup>4</sup> The English Ecclesiastical Court required a guardian *ad litem*.<sup>5</sup> The same rule would seem to prevail in the later Divorce Court; but where to the wife's suit in her own name alone the husband appeared absolutely, he was held to have waived the objection.<sup>6</sup>

§ 515. **Guardianship.** — One under guardianship as a spendthrift has been adjudged competent to sue in his own name for divorce.<sup>7</sup> And in reason the same rule will apply where infancy is the ground of the guardianship; permitting the infant to appear alone in court when prosecuting or defending a claim for divorce, if the practice allows it to the infant in divorce causes under ordinary circumstances. A statute provided that "when either of the parties to a marriage shall be incapable from want of age or understanding of contracting such marriage, the same may be declared void on application of the incapable party." And it was held that the suit must be in the name of the incapable one, not of his guardian.<sup>8</sup>

<sup>1</sup> And see observations of Hemphill, C. J. in *Wright v. Wright*, 3 Tex. 168, 188.

<sup>2</sup> 2 Saund. Wms. ed. 212 *a*, note; *Herdman v. Short*, 18 Ill. 59; *McDaniel v. Correll*, 19 Ill. 226, 68 Am. D. 587; *Roberts v. Stanton*, 2 Munf. 129, 5 Am. D. 463; *Shaefer v. Gates*, 2 B. Monr. 453, 38 Am. D. 164; *Schemerhorn v. Jenkins*, 7 Johns. 373; *Young v. Young*, 3 N. H. 345; *Blood v. Harrington*, 8 Pick. 552; *Oliver v. McDuffie*, 28 Ga. 522; *Jack v. Davis*, 29 Ga.

219; *Fulton v. Roosevelt*, 1 Paige, 178, 19 Am. D. 409.

<sup>3</sup> *Wood v. Wood*, 2 Paige, 108.

<sup>4</sup> *Jones v. Jones*, 18 Me. 308, 36 Am. D. 723. And see *Besore v. Besore*, 49 Ga. 378.

<sup>5</sup> *Barham v. Barham*, 1 Hag. Con. 5; *Brown v. Brown*, 2 Rob. Ec. 302.

<sup>6</sup> *Zycklinski v. Zycklinski*, 2 Swab. & T. 420.

<sup>7</sup> *Richardson v. Richardson*, 50 Vt. 119.

<sup>8</sup> *Pence v. Aughe*, 101 Ind. 317.

III. *Insane Parties.*

§ 516. **Nature of Subject — Difficulties.** — Since single persons are not compelled to marry, and the married can bring or defend divorce suits or not as they choose, and since marriage can be entered into only by the exercise of a competent understanding,<sup>1</sup> — Can a married party whose reason has fled be a plaintiff or defendant, acting either independently or by guardian, in a dissolution suit? If he can, the law seems to have created an anomaly. If he cannot, then the insanity has taken away rights which the divorce statutes gave. And it has conferred on the same party a license to commit adultery, cruelty, desertion, and every other marital offence. Here is a conflict. Added to this, there are in some of the States statutes of no easy interpretation, complicating themselves with whatever is found to be the unwritten rule. In these circumstances, the environed law can do no otherwise than cut somewhere a path through the difficulties. Let us see.

§ 517. **Distinction.** — Either apparently or in fact, there is on this question a distinction between bringing and defending a divorce suit. As to an —

§ 518. *Insane Defendant:* —

**In Principle,** — divorce being a civil proceeding,<sup>2</sup> and it being established practice in the civil department of our law to maintain suits against insane parties the same as against sane ones, there can be no just ground for excepting divorce causes. Both in reason and in authority, insanity may excuse an act otherwise unlawful, but where it does not it is no defence against the injured person's claim for redress. To deny the law's justice to the sane one because of the other's insanity would be to cast in part on the former the burden which God had laid wholly on the latter. Divorce, where there is cause for it, is the plaintiff's right. If the defendant were sane, he could not prevent it; he has no election. Therefore it is not otherwise when he is insane. There has been some stumbling on this question in the English courts; thus, —

§ 519. **Following Criminal-law Rule.** — In the criminal law, one who commits a crime and then becomes insane cannot, while the insanity continues, be tried and convicted.<sup>3</sup> So, yet not in terms

<sup>1</sup> Vol. I. § 588, 614-625.

<sup>2</sup> Ante, § 483-488.

<sup>3</sup> 1 Bishop Crim. Law, § 396; 2 Bishop Crim. Proced. § 664 et seq.

following this rule,<sup>1</sup> Sir C. Cresswell in the English Divorce Court would not allow a husband to proceed against his wife, who was a lunatic, for dissolution on the ground of adultery committed previously to her lunacy. "This case," said this learned judge, "is very different from one where a lunatic is the petitioner.<sup>2</sup> . . . It will be a hard case upon the petitioner if he is not allowed to [carry on his suit]. But it will also be a hard case upon the respondent, who is not able to take part in the proceedings, if he is allowed. I have made inquiry if there had been any case in the ecclesiastical courts under similar circumstances, which could be an authority for me in giving my decision. I am told by Dr. Bayford that there was one which he himself argued in the Court of Arches. It is not reported; but he recollects that the court decided that a suit for divorce *a mensa et thoro* could not be maintained against a lunatic.<sup>3</sup> I cannot allow the petitioner to proceed in the present suit," which, the reader observes, was for dissolution.<sup>4</sup> Afterward, —

§ 520. **Further of this Question.** — This question coming before the full Divorce Court, Lord Penzance, the judge ordinary, and Keating, J., held that the suit could not proceed while the defendant was insane; all were of opinion that it should be continued so long as there was a prospect of recovery; but Kelly, C. B., deemed, dissenting on the other point, that on the failure of such prospect it should go on. It was continued two years; then, there appearing to be no probability of recovery, the petition was dismissed, and an appeal allowed to the House of Lords.<sup>5</sup> The decision proceeded partly on the reason of the thing, and partly on the majority's construction of the Divorce Act. There was assumed to be no difference between the insanity of a plaintiff and that of a defendant; the insanity of either, it was thought, rendering it impossible or improper the cause should proceed. On appeal, —

§ 521. **In the House of Lords,** — the majority of the consulted

<sup>1</sup> See *Baker v. Baker*, 5 P. D. 142, 149.

<sup>2</sup> The counsel had referred to *Portsmouth v. Portsmouth*, 1 Hag. Ec. 355; *Parnell v. Parnell*, 2 Hag. Con. 169, 2 Phillim. 158; and, for analogies, to *Barham v. Barham*, 1 Hag. Con. 5; *Beauraine v. Beauraine*, 1 Hag. Con. 498.

<sup>3</sup> *King v. King*, more fully stated Law Rep. 2 P. & M. 113, where it appears that

the case was before Sir H. Jenner Fust, who ordered it to stand over for consideration, but the question was not decided.

<sup>4</sup> *Bawden v. Bawden*, 2 Swab. & T. 417, 418, 419.

<sup>5</sup> *Mordaunt v. Mordaunt*, Law Rep. before the judge ordinary, 2 P. & M. 103; before the full court, *Ib.* 109; dismissed by the judge ordinary, *Ib.* 382.

judges advised that the case should proceed to judgment. The Lords unanimously sustained this view. But the question had ceased to be looked upon as having anything to do with the unwritten law, and it was now argued on all sides, by counsel, by the consulted judges, and by the Lords in their opinions, as depending solely upon the construction of the Divorce Act. The act had given to the husband, in all cases of adultery by the wife, the right, except as itself had specified, to have the marriage dissolved. Her insanity during the judicial proceedings was not excepted therein, therefore it could not be excepted by the court. So reasoned the majority. The minority, consisting of consulted judges, deemed that there were in the act certain provisions which could not be carried out when the defendant was insane. Hence, that her insanity barred proceedings.<sup>1</sup>

§ 522. **With us**, — the practice of continuing the case against an insane defendant while hope of his recovery remains, has been approved.<sup>2</sup> But the doctrine of reason,<sup>3</sup> which in the absence of a controlling statute permits the cause to proceed when such hope has fled, appears to be sufficiently sustained by our American authorities.<sup>4</sup> There are States wherein statutes have settled this question; as, in Massachusetts: "If at any time during the pendency of a libel the respondent is insane, the court shall appoint some suitable person as guardian to appear and answer in like

<sup>1</sup> *Mordaunt v. Moncreiffe*, Law Rep.

2 H. L. Sc. 374.

<sup>2</sup> *Stratford v. Stratford*, 92 N. C. 297.

<sup>3</sup> Ante, § 518.

<sup>4</sup> *Stratford v. Stratford*, supra; *Rathbun v. Rathbun*, 40 How. Pr. 328; *Broadstreet v. Broadstreet*, 7 Mass. 474; *Mansfield v. Mansfield*, 13 Mass. 412. These two Massachusetts cases were decided before the enactment of the statute stated further on in the text. And see *Montgomery v. Montgomery*, 3 Barb. Ch. 132. In *Mordaunt v. Mordaunt*, ante, § 520 (Law Rep. 2 P. & M. 109, 114, 116), *Mansfield v. Mansfield* was cited to show that the divorce suit may go on though the defendant is insane. On this the judge ordinary asked, "Does the marriage law of Massachusetts allow of recrimination? The difficulty in proceeding against the lunatic respondent in this country lies in that direction." Counsel

on the other side said: "The case of *Mansfield v. Mansfield* is no authority, because in other States of America there have been decisions the other way," referring to the above Massachusetts case of *Broadstreet v. Broadstreet*, and to *Wray v. Wray*, 19 Ala. 522. The entire case of *Broadstreet v. Broadstreet* is stated post, § 528, and the reader will perceive that it contains no such doctrine. It merely holds that insanity at the time of committing the adulterous act is a good defence. As to which see also *Rathbun v. Rathbun*, supra. *Wray v. Wray* is the same; and it does not even clearly appear therein that the defendant was insane at the time of the trial. In *Rathbun v. Rathbun* the court had before it the English case of *Mordaunt v. Mordaunt*, at its earlier stage, but declined to yield to its reasoning.

manner as a guardian for an infant defendant in a suit at law.”<sup>1</sup>

§ 523. *Insane Plaintiff*:—

**Compared with Defendant.**—Contrary to what has sometimes been assumed,<sup>2</sup> an insane applicant for divorce occupies in principle a very different ground from an insane defendant.<sup>3</sup> One who has done what authorizes the sentence has no choice whether or not it shall follow, but the injured party can forgive the wrong, or ask the law’s redress, at his option. If he is insane he cannot elect—shall another, or shall the law, or the court, elect for him?

§ 524. **The Divorce Statute**—may be in terms to answer this question. For example, in England, after considerable conflict of opinion, the Divorce Act is held not to distinguish between plaintiff and defendant,<sup>4</sup> so that an insane plaintiff may maintain his suit for dissolution, acting through and under the guardianship of those who have the control of his person and effects.<sup>5</sup> And in Massachusetts, under the provision that the “libel shall be signed by the libellant<sup>6</sup> if of sound mind and of legal age to consent to marriage, otherwise it may be signed by the guardian of the libellant or by a person admitted by the court to prosecute the libel as his or her next friend,”<sup>7</sup> it has been adjudged competent for the court to grant the divorce, or, it would seem, to refuse it, as public policy and the interests of the parties may be deemed to require.<sup>8</sup> And there are in some of our other States legislative enactments in other forms authorizing, from public considerations, or out of regard to what will often be the real interest of the party, dissolution on the suit of an insane applicant, instituted through a guardian or next friend.<sup>9</sup> But—

§ 525. **In the Absence of a Statute**—(Dissolution)—under the unwritten law, it has been in some of our American cases adjudged that, since marriage can never be contracted by an insane person through a guardian or friend of any sort, and since the

<sup>1</sup> Mass. Pub. Stats. c. 146, § 14. This provision seems to have been first introduced into the Revised Statutes of 1836, suggested by the case of *Mansfield v. Mansfield* mentioned in the last note. See Com. Rep. pt. 2, p. 121. And see *Little v. Little*, 13 Gray, 264; *Garnett v. Garnett*, 114 Mass. 379, 19 Am. R. 369.

<sup>2</sup> For example, see the opinion in *Baker v. Baker*, 5 P. D. 142.

<sup>3</sup> Ante, § 517, 518, 520.

<sup>4</sup> Ante, § 521.

<sup>5</sup> *Baker v. Baker*, 5 P. D. 142, 6 P. D. 12.

<sup>6</sup> Ante, § 509.

<sup>7</sup> Mass. Pub. Stats. c. 146, § 7.

<sup>8</sup> *Cowan v. Cowan*, 139 Mass. 377; *Garnett v. Garnett*, 114 Mass. 379, 19 Am. R. 369.

<sup>9</sup> *Thayer v. Thayer*, 9 R. I. 377.

dissolution of a marriage is equally a matter within the choice or even whim of the party, supposing ground for the dissolution to exist, no suit for a divorce from the bond of matrimony can be instituted or carried on by a complainant who is insane, or by any third person on his behalf.<sup>1</sup> And this appears to be, on the whole, the just doctrine in principle, in the absence of any intimations from a statute. But there are circumstances in which the dissolution is so obviously desirable, and in which it is so plain the insane person would seek it if he had the mental capacity, that one cannot withhold his preference for some form of legislation which gives a guardian, or the court, or the two together, the power to institute and carry on a divorce suit in these circumstances. And —

§ 526. **Bed and Board.** — To the suit for a mere separation from bed and board, not to break the *vinculum* of the marriage, the foregoing reasons do not apply. This suit is for protection and for maintenance. These are needed by the insane as well as by the sane. The English ecclesiastical courts permitted it to insane plaintiffs;<sup>2</sup> and in the Divorce Court it was allowed by the very judge who first decided<sup>3</sup> that the suit for dissolution could not be maintained against a lunatic defendant.<sup>4</sup> So far as we have American authority on the question, it is to the like effect.<sup>5</sup> The committee or guardian of an insane person is in the discharge of his ordinary and proper duties when, in obedience to a call of necessity, he carries on a suit in the name of his ward to procure the protection and sustenance which a divorce from bed and board may give. While this sort of divorce is never fit for the sane,<sup>6</sup> it may often be good for the insane. In like manner, —

§ 527. **Nullity.** — If an insane person is entrapped into a formal ceremony of marriage, reason would indicate that his guardian or committee should be permitted, during the continuance of the insanity, to institute and carry on a proceeding to have it declared void. And so the law is believed to be, not absolutely without

<sup>1</sup> Birdzell v. Birdzell, 33 Kan. 433, 52 Am. R. 539; Worthy v. Worthy, 36 Ga. 45, 46, 47, 91 Am. D. 758; Bradford v. Abend, 89 Ill. 78, 31 Am. R. 67. See, for some illustrative matter, 1 Bishop Mar. Women, § 443.

<sup>2</sup> Ante, § 519, and the cases there cited; particularly Parnell v. Parnell, 2

Hag. Con. 169, 2 Phillim. 158, 1 Eng. Ec. 220.

<sup>3</sup> Ante, § 519.

<sup>4</sup> Woodgate v. Taylor, 2 Swab. & T. 512.

<sup>5</sup> Mims v. Mims, 33 Ala. 98; Fegan's Estate, Myrick Prob. 10.

<sup>6</sup> Vol. I. § 67, 68.

qualifications, both with us and in England.<sup>1</sup> If he should undertake to annul a voidable marriage, — as, for example, in a case of impotence, — other considerations might arise, especially if the marriage was one with which the party was satisfied before becoming insane.<sup>2</sup> So, — to return to the question of an insane defendant, — if we should admit that a suit could not be carried on against him to dissolve a valid marriage, it would not follow that the suit for nullity might not be. Still, should it appear in such a case that the same plaintiff had practised a fraud on the insane defendant, it would hardly accord with correct principle to permit the suit to proceed.<sup>3</sup>

§ 528. *Form of the Proceedings* : —

**By Guardian.** — The insane person, whether plaintiff or defendant, cannot appear in these judicial proceedings alone and unprotected ; he must sue or defend by guardian, guardian *ad litem*, or committee.<sup>4</sup> Precisely how this shall be will depend largely on the varying statutes of our States, and on the practice of the particular court. In a general way, the reader will derive help from the cases cited to the accompanying sections.<sup>5</sup> In one of the early Massachusetts cases, anterior to the statute before quoted,<sup>6</sup> “Wilde,” says the report, “suggested to the court that the [defendant] wife was insane at the time mentioned in the libel, and that she had continued so to this time ; and, expressing some doubt as to the mode of his appearing in her behalf in the cause, the court said he should be admitted to plead in her name. He pleaded that she was not guilty of the crime alleged, and the insanity being proved to the satisfaction of the court, the libel was dismissed.”<sup>7</sup>

<sup>1</sup> Ante, § 505–507 ; *Hancock v. Peaty*, Law Rep. 1 P. & M. 335 ; *Portsmouth v. Portsmouth*, 1 Hag. Ec. 355, 3 Eng. Ec. 154 ; *Turner v. Meyers*, 1 Hag. Con. 414, 4 Eng. Ec. 440 ; *Crump v. Morgan*, 3 Ire. Eq. 91, 40 Am. D. 447 ; *Brown v. Westbrook*, 27 Ga. 102. And see *Clement v. Mattison*, 3 Rich. 93 ; and the discussion and authorities cited in *Mordaunt v. Mordaunt*, Law Rep. 2 P. & M. 109.

<sup>2</sup> Ante, § 506.

<sup>3</sup> *Montgomery v. Montgomery*, 3 Barb. Ch. 132 ; *Johnson v. Kincade*, 2 Ire. Eq. 470.

<sup>4</sup> *Baker v. Baker*, 5 P. D. 142 ; *Mor-*

*daunt v. Moncreiffe*, Law Rep. 2 H. L. Sc. 374 ; *Thayer v. Thayer*, 9 R. I. 377.

<sup>5</sup> Ante, § 505, 506, 518–527. And see (not a divorce case) *Aldridge v. Montgomery*, 9 Ind. 302 ; *Shelf. Mar. & Div.* 200 ; *Coote Ec. Pract.* 314 ; *Carpenter v. Carpenter*, Milward, 159, 161.

<sup>6</sup> Ante, § 524. And see ante, § 522.

<sup>7</sup> *Broadstreet v. Broadstreet*, 7 Mass. 474. But see *Mansfield v. Mansfield*, 13 Mass. 412, in which case, “it being suggested by a friend of the court that since the commission of the crime the husband had become insane, the court ordered the default to be set aside and the libel to be

§ 529. **Insanity denied.**—The statute or rules of court for the appointment of a guardian, or the like, do not take effect if the insanity is denied, until it is in some way proved.<sup>1</sup> As to the method of proof, and the procedure therein, where there is no permanent guardianship, and the question arises simply before the divorcing court, we have the following —

§ 530. **English Precedent.**—After a suit had been commenced in the usual form as between sane persons, a suggestion supported by affidavits was made to the court on behalf of the woman, who was the defendant, that she was not of sound mind. On receiving the affidavits, together with counter affidavits, the court appointed her father temporary guardian for the consideration of this question. “He entered an appearance in obedience to this order, and pleaded that at the time when the citation in this suit was served on the respondent, to wit, on, &c., the respondent was not of sound mind, and that she has not since been, and is not now, of sound mind. The petitioner having taken issue upon this plea, the question was ordered to be tried before the court and a special jury.” This form of arriving at the issue seems not free from defect, but it passed without objection. “The only way,” said the judge ordinary to the jury, “I can put the case is this: Do you think this lady was in such a condition of mental disorder as to be unfit or unable to answer the petition, or duly instruct an attorney for her defence? I prefer this form of the question to that of whether she was mad, insane, out of her mind, and so forth, because it is the practical question we have to solve.” The verdict of the jury was, “that on, &c. [the day when the citation was served], Lady Mordaunt was in such a state of mental disorder as to be totally unfit and unable to answer the petition and to duly instruct her attorney for her defence, and that she has been ever since and still is unfit.”<sup>2</sup>

§ 531. **Question for Court or Jury.**—Whether or not it would be competent for the judge to decide a question like this, where counsel were not agreed, without the aid of a jury,<sup>3</sup> would depend

continued; observing to the proctor for the libellant that, if so advised, she might during the vacation procure the appointment of a guardian to her husband in the Probate Court, and upon the appearance of such guardian in the suit further proceedings might be had, and if sufficient

cause appeared a divorce might be decreed.”

<sup>1</sup> *Fry v. Fry*, 15 P. D. 25, 50.

<sup>2</sup> *Mordaunt v. Mordaunt*, Law Rep. 2 P. & M. 103. As to another question, this case is stated ante, § 520, 521.

<sup>3</sup> For the practice in criminal cases



much on the constitution of the court and the statutes of the State. In the ecclesiastical practice there were no juries, but all questions of fact were decided by the judge.<sup>1</sup> And such, in the absence of any statute on the subject, is the common course in our States. But in modern times and in most of our States, a jury trial has become the statutory right of the party. And in matter of law, if when the alleged offence was committed the defendant was insane, there can be no divorce. Thereupon it has been held that the appointment of a guardian *ad litem*, on the ground of the defendant's insanity, "establishes," in the words of Bigelow, J., "the fact of the existence of insanity in the respondent during the pendency of the suit;" so that on the trial before the jury the defendant will be presumed to be insane.<sup>2</sup> Whence it follows that as a condition of mind once shown is presumed to continue, and as this sort of presumption runs backward in time as well as forward,<sup>3</sup> the appointment of the guardian has changed, as to the question of insanity, the burden of proof on the trial before the jury. And where a statute has taken from the court the right to pass upon the fact of the party's guilt or innocence, the court cannot change the burden of the proof of this fact without the finding of a jury.<sup>4</sup>

under the like circumstances, see 2 Bishop Crim. Proced. § 666-668.

<sup>1</sup> Burn Ec. Law, Practice; 3 Bl. Com. 101.

<sup>2</sup> Little v. Little, 13 Gray, 264; Redden v. Baker, 86 Ind. 191.

<sup>3</sup> Compare with the elucidations in Vol. I. § 1125, 1126.

<sup>4</sup> In Denny v. Denny, 8 Allen, 311, I can say from personal knowledge, this was the principal question argued in behalf of the woman, in opposition to the appointment of a guardian by the court without the help of a jury, on the ground of her insanity. It was one of those cases wherein counsel were clearly of opinion that a jury would find the party to be sane, but the judge would find her to be insane; and the chief effort was on the one side to get a jury trial of the question, and on the other side to prevent it. The complaint in the libel, wherein the present defendant was plaintiff, was that her husband had committed cruelty in thrusting her without cause into an insane asylum.

So insanity was the real and only disputed question to be determined through the jury trial to which the statute entitled her. And it was contended that if the judge, without referring the question to a jury, should change the burden of proof on the final hearing, compelling the wife to begin by proving herself sane contrary to a determination already made in the case, her right to a jury trial would be in effect taken away. The reader will observe that this question does not in any degree appear in the report of the case, — being ignored both in the reporter's statement of the facts and arguments, and in the opinion of the court. Of course, I cannot know what were the judicial reasons for the suppression of this matter; references to outside facts, creating probabilities on the one side or the other, would be inappropriate here. In the later editions of my "Marriage and Divorce," I purposely declined referring to this case (the only instance of the sort which ever occurred in my law writings); and I now have be-

§ 532. **Who Guardian.** — In selecting the person to become guardian of the insane party, the court should protect his rights and interests, and not appoint one who will accept the office to defeat the suit. In the words of Dewey, J., speaking to a case wherein the wife was applicant for a divorce, “no person should be selected who may be adverse in feeling or interest to the libellant, but one who will faithfully protect her rights and interests in reference to the matter of the libel.”<sup>1</sup>

#### IV. *Interventions by Third Persons as Parties.*

§ 533. **In the Ecclesiastical Courts,** — wherein divorce causes were carried on in England when we derived thence our unwritten law, if after the commencement of a suit any third person claimed to have an interest therein, he applied to the court for leave to intervene, — in other words, to become a party. And on such interest being admitted or proved, this his prayer was granted; <sup>2</sup> “as, for instance,” says Law, “in causes of matrimony. . . . If a man takes out proceedings against a woman in a cause matrimonial, and the woman has either solemnized or contracted a marriage with another man, such other man, or third party, may, if he pleases, interpose in the said suit to protect his own rights, in any part of the proceedings, even after the conclusion. It matters not whether he appears in aid or in opposition to the woman. Neither is the case altered by any previous notice he might have of the pending suit, and of the plaintiff’s having proceeded to proof.”<sup>3</sup> There are nice questions as to who may intervene, and the like; but should such a question become important with us, as it rarely will, the reader can easily look it up in the books of the ecclesiastical law.<sup>4</sup>

fore me the note of the case which I had taken for a coming edition, indorsed by me: “Not to be ever used. The case is not properly reported, — the court dodged, and the report is so made as to cover the dodging.” In preparing these New Commentaries, it occurred to me that not even one case should be intentionally omitted, hence this note. It is plain the court did not mean that its decision should be a precedent against the right of jury trial in a case like this; otherwise it would have squarely met the question, would have given its reasons, and the full facts would have appeared in the report.

<sup>1</sup> Denny v. Denny, 8 Allen, 311, 314. And see Fegan’s Estate, Myrick Prob. 10.

<sup>2</sup> Law’s Forms, 70; Shelf. Mar. & Div. 569; Donegal v. Chichester, 3 Phillim. 586; Schoolmasters of Scotland v. Fraser, 2 Hag. Ec. 613; Wood v. Medley, 1 Hag. Ec. 645.

<sup>3</sup> Law’s Forms, 71.

<sup>4</sup> See, besides the authorities already referred to in this section, Ray v. Sherwood, 1 Curt. Ec. 173; Montague v. Montague, 2 Add. Ec. 372; Faremouth v. Watson, 1 Phillim. 355; Hughes v. Turner, 4 Hag. Ec. 30; Kipping v. Ash, 1 Rob. Ec. 270; Pertreis v. Tondear, 1 Hag.

§ 534. **Later English Practice.**—The statutory practice of England, under 20 & 21 Vict. c. 85, and the subsequent divorce acts,<sup>1</sup> does not much concern us. It provides for the intervention of the Queen's Proctor, already explained;<sup>2</sup> also it permits "any person" to intervene.<sup>3</sup> But the latter course seems to be seldom<sup>4</sup> taken; for naturally a private person, wishing to object, would do it through the governmental officer. After the original Divorce Act was passed, but before the adoption of this provision, one without an interest was refused permission to intervene to set up a re-criminatory charge.<sup>5</sup> The statutes have likewise some other provisions under which interventions are permitted.<sup>6</sup> The right is extended to interventions as to the custody of a child.<sup>7</sup>

§ 535. **With us.**—Nothing appears in our published reports showing the ecclesiastical intervention to have been adopted in any of the States as of common law. It is to some extent allowed in New York by statute.<sup>8</sup> But the statute has been construed not to permit the alleged *particeps criminis* to come in and oppose the divorce.<sup>9</sup> Instead of which, the court on request will require notice to her counsel of all proceedings wherein testimony is taken, and suffer her to be present thereat and cross-examine the witnesses, to name witnesses who must be summoned and examined, and herself become a witness.<sup>10</sup> In Vermont, a husband's creditors, who had levied on real estate which he held in right of his wife, were refused their request to intervene in opposition to a divorce suit, on the suggestion of collusion and an attempt to defeat their rights. But it was properly intimated that their legal adviser, or any other person, might, as *amicus curiæ*, make to the court a suggestion of collusion.<sup>11</sup> Plainly this interven-

Con. 136; Dalrymple v. Dalrymple, 2 Hag. Con. 54, 137, note; Clement v. Rhodes, 3 Add. Ec. 37; Braham v. Burchell, 3 Add. Ec. 243, 256; Brotherton v. Helliier, 1 Lee, 599; Wright v. Rutherford, 2 Lee, 266; Shelf. Mar. & Div. 487.

<sup>1</sup> Vol. I. § 153 and note.

<sup>2</sup> Ante, § 265, 494; Anonymous, 2 Swab. & T. 249; Gray v. Gray, 2 Swab. & T. 263; Drummond v. Drummond, 2 Swab. & T. 269; Jessop v. Jessop, 2 Swab. & T. 301; Cox v. Cox, 2 Swab. & T. 306; Blackhall v. Blackhall, 13 P. D. 94.

<sup>3</sup> 23 & 24 Vict. c. 144, § 7.

<sup>4</sup> Consult Howarth v. Howarth, 9 P. D. 218.

<sup>5</sup> Y. v. Y. 1 Swab. & T. 598.

<sup>6</sup> Bell v. Bell, 8 P. D. 217; Wheeler v. Wheeler, 14 P. D. 154.

<sup>7</sup> Chetwynd v. Chetwynd, 4 Swab. & T. 151.

<sup>8</sup> E. B. v. E. C. B. 28 Barb. 299; Anonymous, 15 Abb. Pr. n. s. 307, 2 Thomp. & C. 558.

<sup>9</sup> Compare with Wheeler v. Wheeler, 14 P. D. 154, in which the contrary was held under the English statutes; and with Cornish v. Cornish, 15 P. D. 131.

<sup>10</sup> Clay v. Clay, 21 Hun, 609.

<sup>11</sup> Stearns v. Stearns, 10 Vt. 540. How far an *amicus curiæ* may be permitted to interpose is perhaps not exactly deter-

tion would have been acceded to under the English ecclesiastical practice. And one may hope that hereafter a step so beneficial, and so entirely in accord with the general policy of our divorce laws, will not be denied in other American tribunals. The judge is in these cases under obligation to protect the interests of the public, — why, then, should not persons who have special interests be permitted to protect themselves?<sup>1</sup>

§ 536. *The Doctrine of this Chapter restated.*

The practice of the courts is less interfered with by statutes than the law. It is specially within the power and discretion of the judges. In the common-law tribunals, it has been made by them too unyielding and unelastic. In the equity courts, it is more easily bent to meet the justice of the particular case. In the ecclesiastical, it was more readily conformable to the varying justice provided by the law than in either of the others. But unhappily, in this matter of parties and interventions, the ecclesiastical procedure has commonly in our country given way to that of the equity and even of the common-law courts. In principle, all persons specially interested in the result of a divorce suit should either be made original parties or be permitted to intervene; in practice with us, this right is greatly restricted, but it is not uniform in the different States.

mined. In *Y. v. Y.* 1 Swab. & T. 598, 599, Hill, J. put the question to counsel, — “Can you mention any case in which an *amicus curiæ* has been allowed to suggest a fact not raised by the issues to be tried.” Answer. “I cannot.” But collusion is a

fact whereof the court should take judicial notice, the same as of the law which it is the special province of an *amicus curiæ* to suggest.

<sup>1</sup> As to Georgia, see *Creamer v. Creamer*, 36 Ga. 618.

## CHAPTER XVIII.

FURTHER OF THE FORM OF THE SUIT AND THE PROCESS AND  
SERVICE THEREOF.

- § 537, 538. Introduction.  
 539-558. Notice to Defendant or Appearance.  
 559-564. Cross-suits and Plaintiff as Defendant.  
 565-568. Suits pending and Subsequent Facts.  
 569. Doctrine of Chapter restated.

§ 537. **Elsewhere.** — This chapter is in matter, as in position, intermediate between the last one and the next; so that something of what might be appropriate to it appears in those two chapters instead.

§ 538. **What for this Chapter and how divided.** — We shall consider, I. The Notice to the Defendant or his Appearance; II. Cross-suits and otherwise of the Plaintiff being also Defendant; III. Suits pending at the Bringing of the Suit and Facts subsequently transpiring.

I. *The Notice to the Defendant or his Appearance.*

§ 539. **Already,** — in preceding chapters, we have seen what is the general doctrine of notice to defendants in these divorce cases.<sup>1</sup>

§ 540. **Necessary.** — Natural justice requires such notice of some sort in all judicial proceedings, together with the right to come into court and make defence.<sup>2</sup> So likewise does the law of nations.<sup>3</sup> And where there has been neither service of process, actual or constructive, nor an appearance, it is error to render judgment.<sup>4</sup> And —

<sup>1</sup> Ante, § 25-27, 29, 37, 60, 62, 76, 77, 79-81, 83, 135, 140-142, 144-152, 157, 182, 183.

<sup>2</sup> Bishop First Book, § 24.

<sup>3</sup> Ante, § 25, 26, 37, 77, 83, 140-142.

<sup>4</sup> *Townsend v. Townsend*, 21 Ill. 540; *Jurgielewicz v. Jurgielewicz*, 24 La. An. 77. See *Smith v. Smith*, 20 Mo. 166.

§ 541. **Provided by Statutes.** — Supplementing the requirements of natural justice and of interstate law, the statutes of all our States have provisions either general, or special to divorce causes, regulating the notice. To explain all such statutes in our many States would be profitless, yet a reference to some of the adjudged cases may be convenient.<sup>1</sup> Among the particular propositions are the following, —

§ 542. **Interstate Law and Statute.** — Within explanations in a preceding division of our subject, the notice, to be internationally good, must fulfil both the requirements of the international law and those of the domestic statute.<sup>2</sup> And the domestic statute will be interpreted as far as possible in harmony with the international rule.<sup>3</sup> Now, —

§ 543. **The Decisions** — have been almost exclusively upon the domestic statute. For assuming the tribunal to have internationally a jurisdiction of the subject-matter, it has rarely happened that the domestic statute has fallen short of requiring a notice satisfactory to the interstate law. Under statutes, —

§ 544. **Defendant in Prison.** — Personal service on a defendant confined in the State prison was in New York adjudged to be regular.<sup>4</sup>

§ 545. **Simply Reading.** — A service of the subpcena on the defendant by simply reading it to him was adjudged in Arkansas not to be sufficient;<sup>5</sup> but doubtless there are States in which this would be good.

§ 546. **Arrest.** — In some of our States, under some circumstances, a divorce suit may be commenced by an arrest of the defendant.<sup>6</sup>

<sup>1</sup> *Lyon v. Lyon*, 21 Conn. 185; *Smith v. Smith*, 20 Mo. 166; *Woods v. Woods*, 2 Curt. Ec. 516; *Floyd v. Black*, Litt. Sel. Cas. 11; *Smith v. Smith*, 6 Mass. 36; *McRae v. Mattoon*, 13 Pick. 53; *Farwell v. Smith*, 12 Pick. 83; *Hobart v. Hilliard*, 11 Pick. 143; *Brown v. Brown*, 15 Mass. 389; *Hotchkish's Case*, 1 Root, 355; *Harter v. Harter*, 5 Ohio, 318; *Wanamaker v. Wanamaker*, 10 Philad. 466; *Rochester v. Rochester*, 1 Or. 307; *Young v. Young*, 18 Minn. 90; *Edwards v. Edwards*, 3 Pittsb. 333; *Brown v. Brown*, 10 Neb. 349; *Temple v. Temple*, 13 Lea, 160; *Wilson v. Donaldson*, 117 Ind. 356, 10 Am.

St. 48; *Reeves v. Reeves*, 12 Philad. 188; *Fillman's Appeal*, 99 Pa. 286.

<sup>2</sup> Ante, § 8, 9, 30, 31, 37, 76, 142; *Cheely v. Clayton*, 110 U. S. 701; *Cummington v. Belchertown*, 149 Mass. 223.

<sup>3</sup> Ante, § 10-12.

<sup>4</sup> *Phelps v. Phelps*, 7 Paige, 150. See *Bland v. Bland*, Law Rep. 3 P. & M. 233; *Cummington v. Belchertown*, 149 Mass. 223.

<sup>5</sup> *Welch v. Welch*, 16 Ark. 527. And see *Smith v. Smith*, 9 Mass. 422; *Standridge v. Standridge*, 31 Ga. 223.

<sup>6</sup> *Boucicault v. Boucicault*, 21 Hun, 431, 59 How. Pr. 131; *Jamieson v. Jamie-*

§ 547. **Actual Notice.** — Where actual notice is possible, it ought in fairness to be given, and the court should lean toward requiring it unless there is an appearance.<sup>1</sup> Therefore a libel was held not to be adequately served by leaving an attested copy of it at the defendant's usual place of abode, when he was not then in the house, and had not since been in the country.<sup>2</sup> And in general terms, whatever the form of the statute, if the respondent is living within the jurisdiction of the court, and actual personal notice can be conveyed to him, the judge should not proceed to the hearing, in a defaulted case, until he is made fully satisfied that the party against whom the decree is to be pronounced has received notice in fact, and not merely in law.

§ 548. **Evading Service.** — Where a husband was prosecuting a suit against the administrator of his wife's father for her share of the estate, and she brought her petition for divorce against him, whereupon he concealed himself from the officer to avoid being served with notice, the court ordered a stay in his suit until he should appear and answer to hers. "He asks justice," said the judge, "and he must not refuse to do justice."<sup>4</sup>

§ 549. **Appearance,** — when general, and not limited to the specific purpose of contesting the jurisdiction, is a waiver of any defect in the process or service of it, or other like irregularity, in divorce causes to precisely the same extent as in others.<sup>5</sup> For

son, 53 How. Pr. 112, 11 Hun, 38; Gardiner v. Gardiner, 3 Abb. N. Cas. 1.

<sup>1</sup> Ante, § 140-142; Bland v. Bland, Law Rep. 3 P. & M. 233; Milne v. Milne, 4 Swab. & T. 183; Rowbotham v. Rowbotham, 1 Swab. & T. 73.

<sup>2</sup> Randall v. Randall, 7 Mass. 502.

<sup>3</sup> And see Labotiere v. Labotiere, 8 Mass. 383. In a case under the former New York practice, before the vice-chancellor, it was observed that thereafter in defaulted cases, on a reference to the master for proofs, evidence would be required of the actual service of process on the defendant within the jurisdiction of the court. And the judge mentioned "a case lately before him," which had "progressed very far to a decree when it was found out that service of subpoena had been effected by the husband himself, upon the wife in the city of New Orleans. He also said that he should require the production of the original affidavit of ser-

vice of subpoena, or of a certified copy, in order to see that it was sufficiently positive as to the identity of the party on whom the service was made, as, in one instance which had come to his knowledge, the wife had been personated for the purpose of such a service, and a decree obtained against her entirely by surprise." Shetzler v. Shetzler, 2 Edw. Ch. 584. See also Alexander v. Alexander, 2 Swab. & T. 95; Brown v. Brown, 59 Ill. 315.

\* Baldwin v. Baldwin, 2 Harring. Del. 196. And see Cooke v. Cooke, 2 Swab. & T. 50; Appleyard v. Appleyard, Law Rep. 3 P. & M. 257; Howe Machine Co. v. Pittibone, 74 N. Y. 68; Norton v. Meader, 4 Saw. 603.

<sup>5</sup> Ante, § 76, 77, 81, 547; Stone v. Stone, 10 C. E. Green, 445; Standridge v. Standridge, 31 Ga. 223; Rouse v. Rouse, 47 Iowa, 422; White v. White, 60 N. H. 210.

example, it is too late after verdict to inquire whether or not the suit was brought in the right county.<sup>1</sup> But no appearance or other waiver can authorize divorce in a State where neither party is domiciled, or where otherwise there is no jurisdiction over the subject-matter.<sup>2</sup>

§ 550. *The Constructive Notice to Absent Defendants* :—

Already — we have seen something of the principles which govern this notice.<sup>3</sup>

§ 551. **Statutes** — in all our States provide for this notice in cases wherein, the court having a jurisdiction, the defendant is not within reach of its process. Commonly they state in part how the notice shall be, and direct the judge to supply the rest.

§ 552. **Strict Compliance** — both with the order of the court<sup>4</sup> and with the statute<sup>5</sup> is essential; without which, when there is no appearance, the proceedings will be void. Thus,—

§ 553. **Party's Name**. — Where the libellant's maiden name was in the libel *Launders*, and in the copy published it was *Saunders*, the notice was held to be insufficient by reason of the variance.<sup>6</sup> Again,—

§ 554. **Another State**. — It has already been explained that in international law judicial process cannot run into another State to confer jurisdiction.<sup>7</sup> Yet not unfrequently the statute or the order of the court directs personal service on the party in the other State. In such a case, “jurisdiction,” observed a learned judge, “is not acquired by force of the process of the court as such merely, but because the statute has provided that means of constructively getting the party into court.” This sort of notice has no efficacy beyond any other constructive notice in interstate law.<sup>8</sup> Where, in an English case, process was to be served personally in a foreign country, and it was ascertained that by the law there a defendant would have a right of action against the

<sup>1</sup> *Peeples v. Peeples*, 19 Ill. 269, 271.

<sup>2</sup> Ante, § 43, 47, 50, 76, 133, 151, 157, 183.

<sup>3</sup> Ante, § 25–27, 29, 37, 76, 77, 140–142, 152 and note, 157, 182, 183.

<sup>4</sup> *Smith v. Smith*, 4 Greene, Iowa, 266.

<sup>5</sup> Ante, § 142; *Atkins v. Atkins*, 9 Neb. 191; *Hafern v. Davis*, 10 Wis. 501; *Stone v. Stone*, 1 Stew. Ch. 409; *Fontaine v. Houston*, 58 Ind. 316; *Bradley v. Jamison*, 46 Iowa, 68; *Morey v. Morey*,

27 Minn. 265; *Cissell v. Pulaski*, 3 McCrary, 446.

<sup>6</sup> *Jenne v. Jenne*, 7 Mass. 94. And see further on this question of name, *Colton v. Rupert*, 60 Mich. 318; *Skelton v. Sackett*, 91 Mo. 377; *Fanning v. Krapfl*, 68 Iowa, 244.

<sup>7</sup> Ante, § 140, 144.

<sup>8</sup> *Bradley, J. in Burton v. Burton*, 45 Hun, 68, 71.



person serving it, "I will allow you," said Butt, J., "to serve the citation by enclosing it in a registered letter addressed to the co-respondent, and as the respondent is living in the same house with him, you may send another copy to her, so that it is pretty sure to come to his knowledge."<sup>1</sup>

§ 555. **"Three Weeks successively."** — Notice was ordered to be given by publishing, &c., "three weeks successively," in a newspaper. And this was held to be done when there had not been an interval of a week between either the first and second, or second and third, publications. "The publication has been made," said the judge, "in three successive weeks, which is sufficient."<sup>2</sup> The last publication need not be a week before the hearing.<sup>3</sup>

§ 556. **Further of these Statutes.** — These statutes are in quite varying terms, and in any given State they are liable to be changed from time to time; so it is not deemed best to follow their provisions further. Yet a reference to some of the cases upon them, beyond those already appearing in the notes, may be helpful to the reader.<sup>4</sup> From cases other than divorce he may also derive assistance.<sup>5</sup>

<sup>1</sup> Trubner v. Trubner, 15 P. D. 24.

<sup>2</sup> Bachelor v. Bachelor, 1 Mass. 256. See also Gary v. May, 16 Ohio, 66; Brewer v. Springfield, 97 Mass. 152; Market Bank v. Pacific Bank, 89 N. Y. 397.

<sup>3</sup> Swett v. Sprague, 55 Me. 190.

<sup>4</sup> Homston v. Homston, 3 Mass. 159; Choate v. Choate, 3 Mass. 391; Anonymous, 5 Mass. 197; Smith v. Smith, 6 Mass. 36; Labotiere v. Labotiere, 8 Mass. 383; Plummer v. Plummer, 37 Missis. 185; Ditson v. Ditson, 4 R. I. 87; Sweet v. Avaunt, 2 Bay, 492; Crabb v. Atwood, 10 Ind. 331; Green v. Green, 7 Ind. 113; Meyar v. Meyar, 3 Met. Ky. 298; Harrison v. Harrison, 19 Ala. 499; Smith v. Smith, 4 Greene, Iowa, 266; Pinkney v. Pinkney, 4 Greene, Iowa, 324; Godfrey v. Godfrey, 27 Ga. 466; Anonymous, 27 Me. 563; Mace v. Mace, 7 Mass. 212; Schnauffer v. Schnauffer, 4 La. An. 355; Snyder v. Snyder, 10 Philad. 306; Doughty v. Doughty, 12 C. E. Green, 315; Peckover v. Peckover, 1 Swab. & T. 219; Sutherland v. Cromie, 3 Swab. & T. 210; Rowbotham v. Rowbotham, 1 Swab. & T. 73; Holbrook v. Bronson, 25 La. An. 51; Lewis v. Lewis, 15 Kan. 181;

King v. King, 84 N. C. 32; O'Connell v. O'Connell, 10 Neb. 390; Bratton v. Bratton, 79 Ind. 588; Leavitt v. Leavitt, 135 Mass. 191; Shedenhelm v. Shedenhelm, 21 Neb. 387; Pettiford v. Zoellner, 45 Mich. 358; In re Newman, 75 Cal. 213.

<sup>5</sup> Thus, in a case of tax title, it was held that where thirty days' notice of a public sale is required by statute to be given, and it is not said when the last publication shall be, the direction is sufficiently complied with if the commencement of the notice is thirty days before sale. Coleman v. Anderson, 10 Mass. 105. And see Dexter v. Shepard, 117 Mass. 480; Fry v. Bidwell, 74 Ill. 381. Where the statute required public notice of the time and place of the sale to be given by advertisement in some newspaper "once in each week for at least twelve successive weeks," it was held that a period of twelve full weeks, or eighty-four days, must have elapsed between the first advertised notice and the day on which the sale is made. Early v. Homans, 16 How. U. S. 610. And see Meredith v. Chancey, 59 Ind. 466; Loughridge v. Huntington, 56 Ind. 253. When notice of the sale was re-

§ 557. **Insufficiently served.** — When at the hearing the constructive notice is found to be insufficient, there may be a continuance and a new service ordered, if no provision of law forbids.<sup>1</sup>

§ 558. **Effect of Amendment on Notice.** — In an English case, where the citation was by publication, and the petition was amended, it was held not necessary to advertise the amended form. But the reason assigned will suggest that the rule may be otherwise in some of our States; namely, "inasmuch as it is the practice to advertise the citation only, and not the petition, and the citation does not specify the charges of adultery."<sup>2</sup>

## II. *Cross-suits and otherwise of the Plaintiff being also Defendant.*

§ 559. **Ecclesiastical Practice.** — The flexibility of the practice in the ecclesiastical courts has already been mentioned.<sup>3</sup> In it, parties were in effect both plaintiff and defendant at the same time.<sup>4</sup> So that, for example, one proceeded against for divorce *a mensa et thoro*, or for nullity of the marriage, or for restitution of conjugal rights, not only could bring forward a competent wrong done by the other party in defence of the suit, but if he succeeded in his proofs he could have the proper sentence rendered in his favor, as though he were the original plaintiff.<sup>5</sup>

§ 560. **The Present English Practice** — in divorce causes is likewise quite flexible, but less so than the ecclesiastical.<sup>6</sup>

quired to be published in the newspaper of the public printer of the State, and before the last publication the paper had ceased to be the State paper, it was held to be insufficient. *Bussey v. Leavitt*, 3 Fairf. 378. A newspaper published six days in the week is a "daily newspaper," though the omitted day is not Sunday. *Richardson v. Tobin*, 45 Cal. 30. And see *Drake Attach.* 4th ed. § 436-449 *a*; *Pierce v. Butters*, 21 Kan. 124; *Smith v. Wells*, 69 N. Y. 600; *Gillett v. Needham*, 37 Mich. 143; *Rutenfranz v. Stacer*, 58 Ind. 467; *Thompson v. Higginbotham*, 18 Kan. 42; *Fanning v. Krapfl*, 68 Iowa, 244; *Hackett v. Lathrop*, 36 Kan. 661; *Hartley v. Boynton*, 17 Fed. Rep. 873; *Otis v. Epperson*, 88 Mo. 131.

<sup>1</sup> *Chase v. Chase*, 61 N. H. 123.

<sup>2</sup> *Smith v. Smith*, 3 Swab. & T. 216. See *Huckabay v. Huckabay*, 35 Tex. 620.

<sup>3</sup> Vol. I. § 265; ante, § 503.

<sup>4</sup> Ante, § 464.

<sup>5</sup> And see *Best v. Best*, 1 Add. Ec. 411, 2 Eng. Ec. 158; *Dysart v. Dysart*, 1 Rob. Ec. 106; *Clowes v. Jones*, 3 Curt. Ec. 185, 194.

<sup>6</sup> *Borham v. Borham*, Law Rep. 2 P. & M. 193; *Schira v. Schira*, Law Rep. 1 P. & M. 466; *Drysdale v. Drysdale*, Law Rep. 1 P. & M. 365; *Osborne v. Osborne*, 3 Swab. & T. 327. The statute of 20 & 21 Vict. c. 85, § 22, provides that "in all suits and proceedings, other than proceedings to dissolve any marriage, the court shall proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this act."

§ 561. **Affirmative Relief to Defendant with us.**—The ecclesiastical practice of giving to a defendant affirmative relief as though he were plaintiff, and without the formality of bringing a cross-suit, is not quite unknown with us.<sup>1</sup> Under the Georgia Code, a defendant may have the affirmative relief of a divorce on his answer.<sup>2</sup> And it is the same under the New York Code.<sup>3</sup> But without statutory aid, it is at least the safer practice, in the absence of any decision from the courts of the State, for the defendant to proceed by —

§ 562. **Cross-suit.**—The practice of bringing a cross-suit by the defendant against the plaintiff, to aid the defence and obtain affirmative relief, may be resorted to in divorce cases the same as in others. It is permissible equally whether the proceeding is by bill in equity, by libel corresponding to the ecclesiastical libel, or by a statutory complaint. The subject needs no particular illustration.<sup>4</sup> Even, it has been held, a defendant may maintain his cross-bill for divorce, though he has not the statutory residence in the State necessary in an original complaint. "It is a principle of the law," said Murphy, P. J., "that a court of equity having acquired jurisdiction of the parties and of the subject-matter of the suit will retain and exercise such jurisdiction until the equities of all the parties are meted out to them."<sup>5</sup>

§ 563. **Dismissal.**—There may be some indistinctness in the

<sup>1</sup> *Wuest v. Wuest*, 17 Nev. 217. And see *Shafer v. Shafer*, 10 Neb. 468; *Dodd v. Dodd*, 14 Or. 338.

<sup>2</sup> *Owen v. Owen*, 54 Ga. 526.

<sup>3</sup> *Waltermire v. Waltermire*, 110 N. Y. 183; *Finn v. Finn*, 62 How. Pr. 83; *De Meli v. De Meli*, 67 How. Pr. 20; *J. W. B. v. F. D. B.* 11 N. Y. Leg. Obs. 350, 352; *Linden v. Linden*, 36 Barb. 61; *H. v. H.* 40 Barb. 9; *McNamara v. McNamara*, 2 Hilton, 547, 9 Abb. Pr. 18; *Henry v. Henry*, 3 Rob. N. Y. 614. See *Zule v. Zule*, Saxton, 96; *Bogges v. Bogges*, 4 Dana, 307.

<sup>4</sup> *McCafferty v. McCafferty*, 8 Blackf. 218; *Russell v. Russell*, 1 Smith, Ind. 356, 1 Ind. 510; *Stafford v. Stafford*, 9 Ind. 162; *Bogges v. Bogges*, 4 Dana, 307; *Birkby v. Birkby*, 15 Ill. 120; *Allen v. Allen*, Hemp. 58; *Hoffman v. Hoffman*, 43 Mo. 547; *Lee v. Lee*, 1 Duv. 196; *Bancroft v. Bancroft*, 3 Swab. & T. 597; *Osborne v. Osborne*, 3 Swab. & T. 327;

*Dodd v. Dodd*, 14 Or. 338; *Gilpin v. Gilpin*, 12 Colo. 504; *M. v. D.* 10 P. D. 175; *Mott v. Mott*, 82 Cal. 413; *De Haley v. Haley*, 74 Cal. 489, 5 Am. St. 460, followed by *Wadsworth v. Wadsworth*, 81 Cal. 182; *Deweese v. Dewees*, 55 Missis. 315; *Osborn v. Osborn*, 17 Stew. Ch. 257.

<sup>5</sup> *Sterl v. Sterl*, 2 Bradw. 223, 226.

On the other side, in *Jennison's Ch. Pr.* p. 592, is the following: "Where a husband files a bill for divorce, if his wife is a non-resident, she cannot file a cross-bill thereto for the purpose of obtaining a decree *a vinculo*. Her residence in such suit becomes a jurisdictional fact." Referring to *Story Eq. Pl.* § 398, 399, 629; 2 Barb. Ch. Pr. 131; 2 Dan. Ch. Pr. 1549, note 3; *Minnesota Co. v. St. Paul Co.* 2 Wal. 609, 633; *Tobey v. Foreman*, 79 Ill. 489; *Lawe v. Hyde*, 39 Wis. 345, 351; *Sterl v. Sterl*, supra; *West Virginia Oil, &c. Co. v. Vinal*, 14 W. Va. 637. And see *Grand Rapids, &c. Rld. v. Gray*, 38 Mich. 461.

authorities as to whether or not the dismissal of the original suit will operate to terminate the cross-suit. We have adjudications that it will.<sup>1</sup> Under such a condition of the law, the court should not permit the dismissal.<sup>2</sup> Therefore it need not have this effect, and certainly it will not under other circumstances and by other of the authorities.<sup>3</sup>

§ 564. **Both Allegations proved.** — If the allegations on both sides are proved, the finding in each suit will as recrimination bar the other, and neither party can have a divorce.<sup>4</sup>

### III. *Suits pending at the Bringing of the Suit and Facts subsequently transpiring.*

§ 565. **Pendency of Suit.** — In divorce cases there has not been much discussion of the effect of the pendency of one suit on the right to bring another. But there is no reason why this question should not be governed, in divorce, by the same principles as in other causes in law and equity. In Massachusetts simple desertion, the statute not mentioning any time, was made ground of divorce from bed and board. Subsequently the same, continued five years, was made to authorize divorce from the bond of matrimony. After the latter statute was passed, a party having a suit pending under the former for the limited divorce, brought a fresh one for dissolution, and the pendency of the former was held not to be pleadable in abatement of the latter. "The reason," said Shaw, C. J., "why a second suit cannot be commenced for the same cause, pending a former, is that it is unnecessary, inasmuch as the party prosecuting may have the same remedy under the first as he could obtain by prosecuting another," — a reason which, not being applicable in this case, could not operate to abate this suit.<sup>5</sup>

<sup>1</sup> Stoner v. Stoner, 9 Ind. 505, 506. And see Jenness v. Jenness, 24 Ind. 355, 87 Am. D. 335; Barr v. Barr, 31 Ind. 240; Armstrong v. Armstrong, 27 Ind. 186.

<sup>2</sup> Schira v. Schira, Law Rep. 1 P. & M. 466.

<sup>3</sup> Dewees v. Dewees, 55 Missis. 315; Ficke v. Ficke, 62 Mo. 335.

<sup>4</sup> Ribet v. Ribet, 39 Ala. 348. And see Gullett v. Gullett, 25 Ind. 517; Turner v. Turner, 3 Greenl. 398. See Bennett v. Bennett, 24 Mich. 482.

<sup>5</sup> Stevens v. Stevens, 1 Met. 279, 280.

And see ante, § 188, 474, 475; Monroy v. Monroy, 1 Edw. Ch. 382; Bancroft v. Bancroft, 4 Swab. & T. 84; Wood v. Wood, 13 P. D. 22. According to a Maryland case, the fact that the complainant had filed a bill on the equity side of the County Court, for divorce and alimony, before bringing in the Court of Chancery her bill for maintenance out of the husband's estate, wherein she asked no divorce, is an insuperable obstacle to her obtaining relief in the latter suit. Dunnoek v. Dunnoek, 3 Md. Ch. 140.

§ 566. **Withdrawing and Substituting Petition.** — In a case before the English Divorce Court, a wife who had petitioned for a judicial separation by reason of the husband's cruelty, discovered that unknown to her when bringing the suit he had committed adultery also. She thereupon asked leave to withdraw her petition for separation, and file one for the full divorce to which the combined offences entitled her. The judge ordinary asked whether the wife's proctor had received her costs in the former suit, and being answered in the affirmative, said: "That being so, I will grant the application."<sup>1</sup>

§ 567. **Fresh Offence — Suit Premature.** — In the ecclesiastical practice,<sup>2</sup> one who was carrying on a divorce suit—as, for example, by reason of adultery—could, on learning of a fresh offence committed since the suit began, plead it in a supplemental allegation, even though publication had passed; and if proved it would furnish matter for the decree, to the same extent as though it had transpired before the bringing of the suit.<sup>3</sup> And in the later English divorce practice, if the suit is discovered to have been prematurely brought, the defect may in like manner, according to one case, be cured by a supplemental petition,<sup>4</sup> but this was afterward denied.<sup>5</sup> With us, if the proceeding is in equity, some courts permit this sort of defect to be cured by supplemental bill,<sup>6</sup> others refuse.<sup>7</sup> But by all opinions, without a supplemental or an amended bill, the plaintiff cannot rely upon such subsequent matter.<sup>8</sup>

§ 568. **Defence after Answer.** — Matter of defence arising after the defendant has pleaded may be availed of by a plea *puis darrein continuance*. For example, it is so if the defendant has thus committed adultery, which the plaintiff wishes to set up in re-

<sup>1</sup> Ashley v. Ashley, 2 Swab. & T. 388, 389. And see Turner v. Turner, 2 Swab. & T. 426; Alexander v. Alexander, 2 Swab. & T. 385.

<sup>2</sup> Ante, § 559.

<sup>3</sup> Middleton v. Middleton, 2 Hag. Ec. Supp. 134, 4 Eng. Ec. 299; Webb v. Webb, 1 Hag. Ec. 349, 3 Eng. Ec. 152. And see Barrett v. Barrett, 1 Hag. Ec. 22, 3 Eng. Ec. 16.

<sup>4</sup> Wood v. Wood, 13 P. D. 22.

<sup>5</sup> Lapington v. Lapington, 14 P. D. 21.

<sup>6</sup> Butler v. Butler, 4 Litt. 201; Logan

v. Logan, 2 B. Monr. 142; McCrocklin v. McCrocklin, 2 B. Monr. 370; Feigley v. Feigley, 7 Md. 537, 61 Am. D. 375; Strong v. Strong, 3 Rob. N. Y. 669; Steele v. Steele, 35 Conn. 48.

<sup>7</sup> Milner v. Milner, 2 Edw. Ch. 114; Hill v. Hill, 10 Ala. 527; Embree v. Embree, 53 Ill. 394.

<sup>8</sup> Butler v. Butler, supra; Feigley v. Feigley, supra; Marsh v. Marsh, 2 Beasley, 281; Ferrier v. Ferrier, 4 Edw. Ch. 296. And see Miller v. Miller, 13 Stew. Ch. 475.

crimination ;<sup>1</sup> or has obtained a divorce from the plaintiff, and he desires to bring it to the attention of the court.<sup>2</sup>

§ 569. *The Doctrine of this Chapter restated.*

A court having jurisdiction over a cause of divorce can exercise it only after such appearance of the parties, or such notice to the defendant, as the principles of interstate jurisprudence and the statutes of the particular State require. Where the notice cannot be actual, and the question pertains to the marriage status, it may be constructive. The common rules as to cross-suits, suits pending, and the like, pertain to divorce litigation the same as to the ordinary litigation of the courts. And the more flexible practice of the ecclesiastical tribunals has had some influence upon ours, and upon our legislation, in causes of divorce.

<sup>1</sup> Fuller v. Fuller, 14 Stew. Ch. 198.

<sup>2</sup> Stilphen v. Stilphen, 58 Me. 508, 4 Am. R. 305.

## CHAPTER XIX.

## THE PLEADINGS IN COURT.

- § 570, 571. Introduction.  
572-584. In General of Libel, Bill, or Petition.  
585-588. Joinder of Causes for Divorce.  
589-595. Jurisdictional Allegations.  
596-618. Main Charge and Prayer.  
619-640. Allegations and Practice as to Standard Defences.  
641-653. Subsequent Pleadings.  
654. Doctrine of Chapter restated.

§ 570. **Elsewhere.** — In chapters further on, under the titles of the several offences, — as, Adultery, Cruelty, and the like, — the pleadings special to them respectively will be considered.

§ 571. **Here, and how divided.** — We shall in this chapter inquire after what is common to divorce suits for whatever cause; as to, I. In General of the Libel, Bill, or Petition; II. The Joinder of Causes for Divorce; III. The Jurisdictional Allegations; IV. The Main Charge and Prayer; V. The Allegations and Practice as to the Standard Defences; VI. The Subsequent Pleadings.

I. *In General of the Libel, Bill, or Petition.*

§ 572. **Brevity — Redundant Forms.** — The simpler and briefer a pleading is made, without reducing its allegations below the requirements of the law, the better it is practically. Hence one should not continue to follow forms made redundant by causes no longer in operation. Thus, —

§ 573. **Ecclesiastical.** — As already seen,<sup>1</sup> the libel in the ecclesiastical courts served the double purpose of averment and of suggestions to the examiner in framing questions to the witnesses. Where, with us, it is employed merely for averment, it should be briefer and differently constructed. Again, —

<sup>1</sup> Ante, § 452, 456.

§ 574. **Equity.** — Under the old and to some extent the modern equity practice, a bill in equity is not only for averment, but also for searching the conscience of the defendant, and obtaining from him admissions and declarations under oath.<sup>1</sup> Hence it contains much that is superfluous where allegation only is the object, — better, therefore, omitted.

§ 575. **Ecclesiastical Libel and Ours compared.** — Ayliffe says: "A libel ought to be short, and not verbose, because the law abhors a prolixity of words."<sup>2</sup> But in the ecclesiastical practice it could not be short; since, as it was to search the conscience of the defendant and the memories of witnesses, it necessarily contained almost a full statement of the evidence, in addition to the facts whereon the relief was sought. In order to serve its interrogative ends, it is set out in articles, which are numbered; but an American libel for divorce need not be in numbered articles: it is not interrogative in its nature. An American libel may be short; and it would be injudicious to present to one of our courts, under any circumstances, a libel for divorce drawn upon the English ecclesiastical model.

§ 576. **Later English Petition.** — Under the modern divorce statutes, the English judges, to avoid the prolixity of the ecclesiastical tribunals, and for other reasons of convenience, have established carefully drawn, concise forms for the averments.<sup>3</sup> The petition, which, not calling for answers from the party and witnesses on oath, contains all of allegation deemed necessary, is as follows:—

In the High Court of Justice. Probate, Divorce, and Admiralty Division.  
(Divorce.)

To the Right Honorable the President of the said Division.

The            day of            , 18    .

The Petition of A. B., of            , sheweth,—

1. That your Petitioner was on the            day of            , 18    , lawfully married to C. B., then C. D. [Spinster or Widow], at the *Parish Church of, &c.*

[Here state where the marriage took place.]

<sup>1</sup> As to this, on divorce in an equity tribunal, see *Casey v. Casey*, 2 Barb. 59; *Beach v. Beach*, 11 Paige, 161.

<sup>2</sup> Ayl. Parer. 346.

<sup>3</sup> "Every such petition shall state as distinctly as the nature of the case permits the facts on which the claim to have such marriage dissolved is founded." 20

& 21 Vict. c. 85, § 27. "The court shall make such rules and regulations concerning the practice and procedure under this act as it may from time to time consider expedient, and shall have full power from time to time to revoke or alter the same." Ib. § 53.



2. That after his said marriage your Petitioner lived and cohabited with his said wife at                      and at                      , and that your Petitioner and his said wife have had issue of their said marriage                      children; to wit :

*[Here state the names and ages of the children issue of the marriage.]*

3. That on the                      day of                      , 18                      , and on other days between that day and                      , the said C. B. at                      , in the county of                      , committed adultery with R. S. :
4. That in and during the months of January, February, and March, 18                      , the said R. S. frequently visited the said C. B. at                      , and on divers of such occasions committed adultery with the said C. B.

Your Petitioner therefore humbly prays, —

That your Lordship will be pleased to decree :

*[Here set out the relief sought.]*

And that your Petitioner may have such further and other relief in the premises as to your Lordship may seem meet.

*[Petitioner's signature.]*<sup>1</sup>

§ 577. **Answer.** — That the reader may see how the answer fits — or does not fit — the petition, it is here inserted. The allegations of marriage and of children, not being responded to, are therefore admitted. It is : —

In the High Court of Justice. Probate, Divorce, and Admiralty Division.

(Divorce.)

The                      day of                      , 18                      .

A. B. v. C. B.

The Respondent C. B., by C. D., her solicitor [or in person], in answer to the petition filed in this cause, saith, —

1. That she denies that she committed adultery with R. S. as set forth in the said petition :
2. Respondent further saith, that on the                      day of                      18                      , and on other days between that day and                      , the said A. B., at                      , in the county of                      , committed adultery with K. L.

*[In like manner Respondent is to state connivance, condonation, or other matters relied on as a ground for dismissing the petition.]*

Wherefore this Respondent humbly prays, —

That your Lordship will be pleased to reject the prayer of the said petition, and decree, &c.<sup>2</sup>

§ 578. **Old Massachusetts Libel.** — The following form, from Oliver's Precedents, published many years ago, has been much employed in Massachusetts, commonly more or less varied to meet particular facts or special views of the pleader : —

<sup>1</sup> Weekly Notes of Oct. 16, 1880, p. 484; Browne & P. Div. 602.

<sup>2</sup> Weekly Notes of Oct. 16, 1880, p. 285; Browne & P. Div. 604.

To the Honorable the Justices of the Supreme Judicial Court next to be holden at, &c., within and for the County of, &c., on, &c.

A. B. of, &c., wife of C. B. of, &c., respectfully libels and gives this honorable court to be informed, that she was lawfully married to the said C. B., at, &c., on, &c., and has had by him four children who are now living, viz. K. B., L. B., M. B., and N. B.; that your libellant since their intermarriage has always behaved herself as a faithful, chaste, and affectionate wife towards the said C. B.; but that the said C. B., wholly regardless of his marriage covenant and duty, on divers days and times since the said intermarriage, viz. on, &c., at, &c., has committed the crime of adultery with divers lewd women, viz. with one M. R., one N. R., and one R. P., all of, &c., and with divers other lewd women whose names are to your libellant unknown; that the said C. B. and the said A. B. in her right hold in fee-simple, real estate of the value of \$ , within this Commonwealth; that by reason of the said marriage, the said C. B. has received personal estate to the value of \$ ; that the said C. B. is seized in fee in his own right of a valuable real estate, situate within this Commonwealth, and owns and has a large and valuable personal estate, to wit, of the value of \$ , besides the personal estate which he received by reason of said marriage; wherefore the said libellant prays right and justice, and that she may be divorced from the bonds of matrimony between her and her said husband; that all the personal estate which he received by reason of said marriage, as aforesaid, or a sum of money equal in value to the whole of the same personal estate, may be assigned to her for her own use, and that the custody and education of two of the said children, viz. M. B. and N. B., on account of their tender years, may be committed and intrusted to her; and as in duty bound will ever pray, &c.

§ 579. **Old Connecticut Libel.**—The following is from the second edition of Swift's Digest:—

To the Hon. &c.

The petition of A. B., of , humbly sheweth, that on the day of , she, by the name of A. S., was lawfully married to L. B., of said , and that she continued to live with the said L. B., in the faithful discharge of all the duties incumbent on her as the wife of the said L. B., until the day of , when the said L. B. deserted the petitioner, and has ever since, for more than three years, wholly neglected and refused to live with or provide for the petitioner as his wife, and has wholly neglected to discharge any of the duties incumbent on him as her husband. She therefore prays, that this honorable court will order and decree that the petitioner be divorced from the said L. B., and declared to be sole, single, and unmarried.

Dated .

A. B.

§ 580. **Bill in Equity.**—In some of our States, the proceeding is strictly in equity, and then the form of the bill is the same as in other equity suits, — not necessary to be given here.

§ 581. **A Statutory Practice,**—including a form for the com-

plaint, is provided in some of the other States. The practitioner will have all such matter in his local books.

§ 582. **Numbered Paragraphs**, — like those in the English form, are not common with us, but they are not legally objectionable.

§ 583. **Signing the Libel** — has already been considered.<sup>1</sup>

§ 584. **Swearing to it** — is not necessary on general principles of pleading. But there are States wherein, by statute or otherwise, it is required.<sup>2</sup>

## II. *The Joinder of Causes for Divorce.*

§ 585. **Leading to Same Sentence**. — If several matrimonial wrongs — as, for example, adultery and cruelty — are each made cause for the same kind of divorce, whether from bed and board or from the bond of matrimony, the applicant for divorce may join all in one libel, and take his decree for the one or more particular offences which he proves. This is universal practice in England and in our States.<sup>3</sup> In one case, the bill charged cruelty, desertion, and adultery, any one alone being adequate, and the judge observed that this was no objection to it, and added: "The title to the relief prayed is the same whether one or the other of the several alleged grounds be proved. It is well settled that the plaintiff may aver facts of a different nature, which will equally support his application."<sup>4</sup> But —

§ 586. **Different Sorts of Divorce**. — Where the divorce for one offence is from bed and board, and for the other it is from the bond of matrimony, the rule just stated is not universal. Thus, —

§ 587. **In Equity**, — according to decisions in the former New York Court of Chancery, and in New Jersey, where the divorce for adultery is from the bond of matrimony, and for cruelty it is from bed and board, the two cannot be joined in one bill.<sup>5</sup>

<sup>1</sup> Ante, § 509.

<sup>2</sup> *McCraney v. McCraney*, 5 Iowa, 232, 68 Am. D. 702; *Dickinson v. Dickinson*, 3 Murph. 327, 9 Am. D. 608; *Dyer v. Dyer*, 5 N. H. 271; *Warner v. Warner*, 11 Kan. 121; *P. v. McCaffrey*, 75 Mich. 115; *Ex parte Bruce*, 6 P. D. 16.

<sup>3</sup> And see *Stokes v. Stokes*, 1 Misso. 320; *Morris v. Morris*, 20 Ala. 168; *Mc-*

*Donald v. McDonald*, 1 Mich. N. P. 191; *Fritz v. Fritz*, 23 Ind. 388; *Griffith v. Griffith*, 89 N. C. 113.

<sup>4</sup> *Quarles v. Quarles*, 19 Ala. 363, 366, opinion by Chilton, J.

<sup>5</sup> *Mulock v. Mulock*, 1 Edw. Ch. 14; *Rose v. Rose*, 11 Paige, 166; *Beach v. Beach*, 11 Paige, 161; *Smith v. Smith*, 4 Paige, 92; *Decamp v. Decamp*, 1 Green

But the reasons for this are in part not applicable in all the other States. Kent, Ch., explained as follows: "The charges of adultery and of cruel usage are not only distinct and unconnected charges, but they lead to distinct issues and decrees. An answer to a charge of adultery may be without oath, but an answer to a charge of cruel usage must be upon oath. The charges, therefore, necessarily require separate answers; and if the charge of adultery be denied, a feigned issue must be awarded, which need not be the case on denial of the charge of cruel usage, but the latter may be tried upon depositions, according to the ordinary course of the court. If the adultery be confessed, or if the bill as to that charge be taken *pro confesso*, still there must be a reference to a master to take and report proof of the charge; and the cause must be brought regularly to a hearing upon such proof. But if the defendant confesses the other charge, or if he suffers the bill to be taken *pro confesso*, the admission is conclusive, and puts an end to the controversy. The decrees in the two cases are essentially different. In the one, it is an absolute divorce, with a disability to the defendant to marry again. In the other, the divorce is only *a mensa et thoro*, and may be for life or for a limited time in the discretion of the court." And there were still other differences in the procedure, which he pointed out.<sup>1</sup> On the other hand,—

§ 588. **Not in Equity.** — Where the proceeding is not in equity, or otherwise is the same for the different offences down to the time of the sentence of the court which will be for the full or partial divorce according to the proofs, there can be in reason, and according to all the analogies from the other departments of the law, no objection to joining any number of different causes, and granting the plaintiff the highest divorce to which on the hearing he is found to be entitled. This was always so, for example, in Massachusetts.<sup>2</sup> But there would seem to be—perhaps a careful examination would disclose that there are not—courts in which this question is not looked upon precisely so.<sup>3</sup>

Ch. 294; *Pomeroy v. Pomeroy*, 1 Johns. Young v. Young, 4 Mass. 430. And see Ch. 606; *Snover v. Snover*, 2 Stock. 261. Mack v. Handy, 39 La. An. 491; post,

<sup>1</sup> *Johnson v. Johnson*, 6 Johns. Ch. § 616–618.

163.

<sup>3</sup> *Schafberg v. Schafberg*, 52 Mich.

<sup>2</sup> *Wagner v. Wagner*, 36 Minn. 239; 429; *Zorn v. Zorn*, 38 Hun, 67.

III. *The Jurisdictional Allegations.*

§ 589. **Distinguished** — (**After Judgment** — **Before**). — It does not follow that because the judgment of a court of record is *prima facie* deemed to be founded on sufficient jurisdiction,<sup>1</sup> therefore the court rendering it took no note of whether it had jurisdiction or not. We are rather to presume that it looked carefully into the question of its own authority, and did not act otherwise than it lawfully could. Hence,—

§ 590. **Doctrine defined.** — Though the judicial utterances have not all been carefully considered, the true view appears to be that a court will not entertain any case except where *prima facie* a jurisdiction appears to the judicial understanding. In most litigation, this does appear from the mere allegations of the defendant's wrong. But where some special fact, in addition to such wrong, is by the law made an affirmative element in the jurisdiction, this fact must be alleged. To illustrate,—

§ 591. **In United States' Courts.** — Where the national tribunals have a jurisdiction by reason of the diverse citizenship of the parties, the subject-matter not alone sufficing, such citizenship must appear in allegation.<sup>2</sup> For the fact is special to the individual instance, and without it there is no jurisdiction. Within the principle thus explained,—

§ 592. **Prima Facie Jurisdiction.** — We have seen<sup>3</sup> that the English petition alleges the place of the parties' residence, of the marriage, of the cohabitation under it, and of the *delictum*. Thus are disclosed all the jurisdictional facts which are *prima facie* essential to the jurisdiction under the English law, and probably more. We have likewise American illustrations of the same idea.<sup>4</sup> Indeed, in this sort of case, the jurisdiction will ordinarily appear from the mere allegation of the *delictum* and its accompaniments. But—

§ 593. **Plaintiff's Residence or Domicil.** — In the greater number of our States, there are statutes requiring the applicant for divorce to have resided a given number of years in the State. Such

<sup>1</sup> Ante, § 184.

<sup>2</sup> *Robertson v. Cease*, 97 U. S. 646; *Brown v. Keene*, 8 Pet. 112; *Grace v. American Cent. Ins. Co.* 109 U. S. 278.

<sup>3</sup> Ante, § 576.

<sup>4</sup> See, for example, *Ellison v. Martin*, 53 Mo. 575; *Cole v. Cole*, 3 Mo. Ap. 571;

*Pate v. Pate*, 6 Mo. Ap. 49; *Homston v. Homston*, 3 Mass. 159; *Richardson v. Richardson*, 50 Vt. 119; *McFarland v. McFarland*, 40 Ind. 458; *Huston v. Huston*, 63 Me. 184; *Young v. Young*, 18 Minn. 90; *Kimball v. Kimball*, 13 N. H. 222.

residence, therefore, has become a special fact, without which there is no jurisdiction, and it must be alleged. Thus,—

§ 594. **Adequate and Inadequate Forms.**—Under the provision that “no divorce shall be granted to any applicant unless it shall appear that such applicant has resided in the State of Florida for the space of two years prior to the time of such application,” it was adjudged adequate, both as to the residence and the marriage, to aver that “the complainant is, and has been for more than two years, a resident of this State, and that the parties were married at Jacksonville in this State, according to law, in April, 1862, where the parties have ever since lived.”<sup>1</sup> Practically, in all such cases, the pleader should adhere as closely as possible to the very words of the statute, yet a disregard of this advice will not always be fatal. And where the expression in the statute was “usually resides,” and that in the allegation “now resides, and for some while has resided, in this county,” the variance was not deemed material.<sup>2</sup> On the other hand, the statutory words being “shall at the time of exhibiting his petition be an actual *bona fide* inhabitant of the State, and shall have resided in the county where the suit is filed six months next preceding the filing of the suit,” they were held not to be satisfied by the setting out that the plaintiff “is a *bona fide* citizen of the county of Bell, State of Texas, and has been for more than six months before the filing of this petition.”<sup>3</sup>

§ 595. **Other Questions**—within these principles will arise, but their solutions will be plain, and they do not require further explanation.<sup>4</sup>

#### IV. *The Main Charge and Prayer.*

§ 596. **Further on,**—in a series of chapters, the allegations for the particular causes of divorce will be explained.

<sup>1</sup> Burns v. Burns, 13 Fla. 369, 376.

<sup>2</sup> Lochnane v. Lochnane, 78 Ky. 467.

<sup>3</sup> Haymond v. Haymond, 74 Tex. 414.

<sup>4</sup> On this subject the reader may consult Edwards v. Edwards, 30 Ala. 394; Crossman v. Crossman, 33 Ala. 486; Batchelder v. Batchelder, 14 N. H. 380; Fellows v. Fellows, 8 N. H. 160; Smith v. Smith, 12 N. H. 80; ante, § 592; Lattier v. Lattier, 5 Ohio, 538; McIntyre v. McIntyre, Wright, 135; Guild v. Guild, 16

Vt. 512; Mix v. Mix, 1 Johns. Ch. 204; Jarvis v. Jarvis, 3 Edw. Ch. 462; Emmons v. Emmons, Walk. Mich. 532; Townsend v. Townsend, 2 R. I. 150; Leseuer v. Leseuer, 31 Barb. 330; Cole v. Cole, 3 Mo. Ap. 571; Pate v. Pate, 6 Mo. Ap. 49; Maxwell v. Maxwell, 53 Ind. 363; Powell v. Powell, 53 Ind. 513; Bennett v. Bennett, 28 Cal. 599; Strode v. Strode, 3 Bush, 227, 96 Am. D. 211.

§ 597. **The General Doctrine** — regulating the frame of the accusation is the same in all litigation civil and criminal, therefore including divorce; namely, that the allegation, while not necessarily anticipating and answering defences, must show by facts stated a complete *prima facie* wrong, in terms sufficiently minute to identify the transaction, and enable the defendant to present thereto any defence which he may have.<sup>1</sup> The practical applications of this doctrine are mainly regulated by the special nature of the individual case and the usages of the court entertaining it. Some particulars which may be helpful in divorce causes are —

§ 598. **Following Statutory Terms.** — Though, as we saw in the first volume, differing words in a divorce statute are often made by interpretation to signify the same thing in the law,<sup>2</sup> yet a petition for divorce, like any other pleading upon a statute,<sup>3</sup> must, in setting out the offence complained of, follow in substance the statutory terms, — employing either their words or their equivalents.<sup>4</sup> Beyond which, —

§ 599. **Particulars.** — It must descend so far into the particulars of the transaction as to satisfy the general rule above stated, to identify the offence, and to put the defendant in a situation to answer thereto, and otherwise prepare his defence.<sup>5</sup> Within which rule, —

§ 600. **Certain.** — The acts complained of should be set out with the certainty of fact, time, place, and person, required in other civil pleadings.<sup>6</sup> And —

§ 601. **Comprehensive.** — The averments must contain all the elements constituting an adequate cause for the divorce,<sup>7</sup> and they must have been in existence when the libel was filed.<sup>8</sup> Otherwise, though a jury should find a verdict for the libellant, no judgment can be rendered thereon.<sup>9</sup>

§ 602. **Continuing Cause.** — Where the cause is of a sort re-

<sup>1</sup> See, for example, the elucidations in 1 Bishop Crim. Proced. § 323-328, 506 et seq.

<sup>2</sup> Vol. I. § 1534, 1535, 1664, 1665.

<sup>3</sup> 1 Bishop Crim. Proced. § 608 et seq.

<sup>4</sup> Horne v. Horne, 1 Tenn. Ch. 259; Edwards v. Edwards, 9 Philad. 617; Lord v. S. 17 Neb. 526.

<sup>5</sup> Crawford v. Crawford, 17 Fla. 180; Miller v. Miller, 14 Mo. Ap. 418; Dietrick v. Dietrick, 14 Philad. 649.

<sup>6</sup> Everton v. Everton, 5 Jones, N. C. 202; Horne v. Horne, 1 Tenn. Ch. 259; Strong v. Strong, 4 Rob. N. Y. 621; Grove's Appeal, 37 Pa. 443, 446; Bennett v. Bennett, 24 Mich. 482.

<sup>7</sup> Anonymous, 27 Me. 563.

<sup>8</sup> Ante, § 567; Bennett v. Bennett, 24 Mich. 482.

<sup>9</sup> Johnson v. Johnson, 4 Wis. 135.

quired by law to be continuing at the bringing of the suit, the date of the libel must not be anterior to the time of the filing. It was once suggested, as the better course in such a case, that no date be attached, "leaving the date of the filing to be regarded as the date of the petition."<sup>1</sup>

§ 603. **Allegation and Proof to correspond.** — Averring adequate matter and proving adequate matter will not avail, if the former and latter are not the same. Thus, where a wife sued for a divorce from bed and board for her husband's cruelty and desertion, and at the hearing it appeared that at the time of the marriage he had a former wife living, thereby entitling her to a sentence of nullity, she was refused it, because the bill was not framed with reference to this relief.<sup>2</sup>

§ 604. *Allegation of Marriage* : —

**Essential.** — The libel must allege a marriage, and this rule applies as well in suits for nullity of marriage as in ordinary divorce suits.<sup>3</sup>

§ 605. **Form.** — The form of this allegation, we are about to see, does not very distinctly appear in the books. The following is proposed, as both convenient and satisfying the requirements of the law : —

That on, &c., at, &c., your petitioner was in due form of law married to the respondent, her name then before marriage being Sarah Jane Armstrong.

§ 606. **In the Ecclesiastical Practice,** — wherein as we have seen the allegations, which had likewise the effect of interrogatories, were prolix to a degree not tolerable in ours,<sup>4</sup> the marriage was set out with a particularity of time, place, matrimonial capacity, manner, name of celebrator, other names, cohabitation under it, and other particulars quite too minute for our present contemplation.<sup>5</sup>

§ 607. **The Age** — of the parties was held in the ecclesiastical courts not to be necessary in the allegation for the restitution of conjugal rights. "Where," said Sir John Nicholl, "it is pleaded that the parties were lawfully married, and the affidavit is exhibited in which the age is averred, and the entry of the marriage, the averments are sufficient; it lies on the adverse party to show anything he thinks may impeach it."<sup>6</sup> And —

<sup>1</sup> Davis v. Davis, 37 N. H. 191, 192.

<sup>2</sup> Zule v. Zule, Saxton, 96.

<sup>3</sup> Coote Ec. Pract. 320, 350, 362, 370, 377, 399, 411, 416; post, § 732, 734, 737.

<sup>4</sup> Ante, § 575.

<sup>5</sup> Coote Ec. Pract. 320, 321.

<sup>6</sup> Pool v. Pool, 2 Phillim. 119, 120.



§ 608. **Method of Marriage** — (“**Lawfully Married**”). — In a divorce suit, it was adjudged sufficient to plead that the parties were “lawfully married,” without mentioning anything of banns or a license. The word “lawfully,” it was observed, conveys the whole.<sup>1</sup> We may doubt the necessity even of this word “lawful,” since what is unlawful is not marriage. And so the Maine Court held.<sup>2</sup>

§ 609. **Averring Courtship**. — In the ecclesiastical practice, it was customary to aver a courtship. But this was not necessary. Still Dr. Lushington said of it: “When long-established forms are departed from, the vigilance of the court is usually excited.”<sup>3</sup>

§ 610. **Place of Marriage**. — The question of alleging the place of the marriage complicates itself in New Hampshire with that of the jurisdiction, so that there it is required.<sup>4</sup> And if the marriage was celebrated in the State, there need be no added allegation of residence. If it was elsewhere, the libellant’s residence in the State at the time of the *delictum* must be averred; for the court has no jurisdiction over causes of divorce which occurred while the parties were living in another State.<sup>5</sup> Out of New Hampshire, we have intimations that there are circumstances in which the place of marriage should be stated.<sup>6</sup> The forms prepared by the English judges for the Divorce Court have this allegation.<sup>7</sup> Whether or not in indictments for polygamy it is necessary as to the first marriage, and as to the marriage in adultery, is a question not in all respects absolutely settled by the authorities.<sup>8</sup> But if it is not required in them, the consequence is not unavoidable that it is not in the divorce libel. For in those criminal prosecutions such marriage is only inducement; but in divorce it is the foundation of the proceeding. The second marriage, in criminal polygamy, must be averred with time and place, on another principle; namely, to show an offence within the jurisdiction of the court. For identifying the trans-

<sup>1</sup> Leighton v. Leighton, 14 Jur. 318.

<sup>2</sup> Huston v. Huston, 63 Me. 184. Of course, **Agreement to Marry**. — To allege merely an agreement to marry will not suffice; it must be a marriage. Brinckle v. Brinckle, 10 Philad. 1.

<sup>3</sup> Dillon v. Dillon, 3 Curt. Ec. 86, 90, 7 Eng. Ec. 377, 379.

<sup>4</sup> Ante, § 589-595. And see ante, § 168-172.

<sup>5</sup> Greenlaw v. Greenlaw, 12 N. H. 200; White v. White, 5 N. H. 476; ante, § 168-172. And see Batchelder v. Batchelder, 14 N. H. 380; Mix v. Mix, 1 Johns. Ch. 204.

<sup>6</sup> Hare v. Hare, 10 Tex. 355, 358.

<sup>7</sup> Ante, § 576; Swabey Div. 180; Law Rep. 1 P. & M. 763.

<sup>8</sup> Bishop Stat. Crimes, § 598-603, 673.

action, and giving certainty<sup>1</sup> to its setting out, some averment of the place is highly proper, and, at least, practically best, whatever may be adjudged as to its strict necessity. So,—

§ 611. **Maiden Name.**—It is customary, and to facilitate the proofs of identity, and explain the certificate of marriage when offered in evidence, it is practically desirable to insert in the allegation the name by which the woman was known before marriage.<sup>2</sup> In this form is the second marriage set out in the indictment for polygamy.<sup>3</sup> And though the question is probably not conclusively decided, there is some ground of reason for deeming this averment indispensable in the libel for divorce.<sup>4</sup>

§ 612. *The Plaintiff alleging his own Virtues*:—

**In Principle**,—there is no need for this sort of averment. Any relevant lack of well-doing in the plaintiff is matter for the defence, and no excess of virtue in him will justify divorce for the defendant's ill conduct short of what would suffice if he were simply blameless. Still,—

§ 613. **How the Precedents.**—In the famous case of *Evans v. Evans*, which was a wife's suit for cruelty, Lord Stowell observed: "In her libel she pleads, as is usual,"—a practice which we are informed by the reporter in a note was afterward discontinued,—"though not necessary, and sometimes disadvantageous, her virtuous education, and good disposition, and her excellent conduct in the characters of a wife and a mother. One inconvenience arises from an article of this kind, that it gives opportunity and invitation to the other party to counterplead in contradiction to this good character, as has been done in this case, in which a counterplea is given full of unfavorable epithets applied to her, and, amongst others, that she is a woman subject to habits of intoxication."<sup>5</sup> And our American libel, especially where the wife is plaintiff, not unfrequently indulges in this sort of injudicious pleading. It is gallant in the pleader, sweetly flattering, and the temptations to it are strong. But—

§ 614. **Under Statutes.**—In some of our States we have statutes favoring or even compelling this sort of allegation. For the libel must cover the statutory terms.<sup>6</sup> Thus, not inquiring whether or not former provisions have been repealed, it being in

<sup>1</sup> Ante, § 600.

<sup>2</sup> Ante, § 576, 606.

<sup>3</sup> Bishop Stat. Crimes, § 598, 600.

<sup>4</sup> But see ante, § 594.

<sup>5</sup> *Evans v. Evans*, 1 Hag. Con. 35, 95,

<sup>4</sup> Eng. Ec. 310, 338, note.

<sup>6</sup> Ante, § 598.

Kentucky enacted that in certain cases the divorce should be granted "to the party not in fault," absence of fault was required to be alleged by the plaintiff.<sup>1</sup> Likewise in other States there are or were provisions more or less like this one, doubtless therefore to be covered by averment; as, in Indiana,<sup>2</sup> Missouri,<sup>3</sup> Tennessee.<sup>4</sup> In the absence of these special statutory terms, —

§ 615. **Prima Facie Case.** — The libel need simply charge all facts which are *prima facie* necessary to the granting of the divorce.<sup>5</sup>

§ 616. *The Prayer:* —

**Both General and Specific.** — In the ordinary equity practice, one who in his bill prays both general and specific relief may have any decree to which his allegations of fact and his proofs show him at the hearing to be entitled.<sup>6</sup> Whence it follows that if a bill for divorce sets out facts justifying a dissolution, and a part of them authorize a separation from bed and board, the complainant on proving the part may have the latter divorce on his prayer for general relief, though his bill specifically asks only the former. So it is in principle, yet the books furnish little direct authority on this question.<sup>7</sup>

§ 617. **Specific only.** — The further doctrine is, that if there is no general prayer, but a specific one, the particular relief will be granted or none.<sup>8</sup> Yet in a case before the English Divorce Court, the prayer of the plaintiff wife was for dissolution by reason of adultery and desertion; she proved adultery only, which entitled her merely to a judicial separation; and notwithstanding the prayer, the court held that as she had brought her case within the law authorizing the latter remedy, it might be granted.<sup>9</sup> Moreover, —

§ 618. **Altering Prayer.** — The English Divorce Court at the hearing will ordinarily, if the proofs sustain the whole charge,

<sup>1</sup> Epling v. Epling, 1 Bush, 74.

<sup>2</sup> Kenemer v. Kenemer, 26 Ind. 330;

Fritz v. Fritz, 23 Ind. 388.

<sup>3</sup> Yallaly v. Yallaly, 39 Mo. 490.

<sup>4</sup> Cameron v. Cameron, 2 Coldw. 375.

<sup>5</sup> White v. White, 45 N. H. 121.

<sup>6</sup> Tayloe v. Merchants Fire Ins. Co. 9 How. U. S. 390.

<sup>7</sup> The reader may consult Klingenberg v. Klingenberg, 6 S. & R. 187; Hackney v. Hackney, 9 Humph. 450;

Thornberry v. Thornberry, 2 J. J. Mar. 322.

<sup>8</sup> Walton v. Walton, 32 Barb. 203; Whittington v. Whittington, 2 Dev. & Bat. 64; Clayton v. Clayton, 1 Ashm. 52; and see Moore v. Guest, 8 Tex. 117; Edmonds v. Her Husband, 4 La. An. 489.

<sup>9</sup> Smith v. Smith, 1 Swab. & T. 359, 362. This case states distinctly that the prayer was "simply for a dissolution."

permit the petitioner to alter her prayer and take the judicial separation; yet not when injustice will thereby be done to the other side, or where there is any other like impediment.<sup>1</sup>

V. *The Allegations and Practice as to the Standard Defences.*

§ 619. **Doctrine defined.**—The public being a party to the divorce suit,<sup>2</sup> if in any manner there is disclosed in it an adequate defence though not pleaded, the sought-for divorce will not be granted, the public interest not permitting.<sup>3</sup> But as between the parties of record, the law does not require the libel to negative the defences; and it casts on the defendant the burden of alleging and proving any defence whereon he relies, and forbids him to introduce evidence of one not averred. To descend to particulars, —

§ 620. *As to the Libel and Answer:—*

**Anticipating Defences.**—As a sort of substitute for the Scotch oath of calumny,<sup>4</sup> we have in a few of our States a singular practice, introduced by a rule of court or by a statute, requiring the applicant for divorce to deny in his petition that the defendant has any one of certain specified defences.<sup>5</sup> For example, in Michigan, the bill asking a divorce for adultery must, to quote from a late work on equity practice, aver that it “was committed without the consent, connivance, privity, or procurement of the complainant, and that the complainant has not voluntarily cohabited with the defendant since the discovery of such adultery.” And like averments are required in bills for divorce on other grounds.<sup>6</sup> Similar to this was the practice in the old Court of Chancery in New York, apparently introduced by a rule of court,<sup>7</sup> and it is continued in the later practice.<sup>8</sup> But—

§ 621. **Libel not anticipating Defences — (Connivance, Condo-**

<sup>1</sup> Mycock v. Mycock, Law Rep. 2 P. & M. 98.

<sup>2</sup> Ante, § 479–498.

<sup>3</sup> Post, § 663, 664.

<sup>4</sup> Ante, § 264.

<sup>5</sup> Ante, § 259, note, 263.

<sup>6</sup> Jennison Ch. Pract. 589, referring to Ch. Rule 95, and 2 Comp. L. 1871, § 4742. And see Simons v. Simons, 47 Mich. 253.

<sup>7</sup> Ante, § 259, note; Kane v. Kane, 3 Edw. Ch. 389; Johnson v. Johnson, 1

Edw. Ch. 439; Rose v. Rose, 11 Paige, 166. And see, as to other States, Emmons v. Emmons, Walk. Mich. 532; Burns v. Burns, 60 Ind. 259.

<sup>8</sup> Rule 64, Voorhies Code, 5th ed. 639. And see Hoffman v. Hoffman, 46 N. Y. 30, 34, 7 Am. R. 299; Myers v. Myers, 41 Barb. 114, 117, where it is observed: “To this effect is 2 R. S. 145, § 55, [42.] sub. 1.”

nation, Recrimination). — Contrary to this exceptional practice, the general doctrine is that connivance, condonation, and recrimination are respectively matter of defence only, and to deny them in the libel is alike needless and irregular.<sup>1</sup> On this, as to the —

§ 622. **Ecclesiastical Practice.** — There was in the practice of the English ecclesiastical courts as to this matter, some looseness, owing probably to the fact that the allegations on the one side and on the other were made with the double purpose of exhibiting ground in law for the relief prayed, and drawing testimony out of witnesses and the opposite party.<sup>2</sup> Sir John Nicholl observed that “where the party himself has the benefit of being heard on his own statements, he should set forth everything fully, or the court will take the statement to his disadvantage.”<sup>3</sup> And in these courts, as in all others, it was commonly no objection to an allegation that it contained more than was necessary to entitle the party to his remedy.<sup>4</sup> Yet these defences were strictly for the defendant, who must allege and prove them, and the plaintiff was not required to show their non-existence.<sup>5</sup>

§ 623. **Later English Practice.** — We have seen that the complaint before the Divorce Court contains no denial of these defences.<sup>6</sup> But the Divorce Act requires the petitioner to “file an affidavit . . . stating that there is not any collusion or connivance between the deponent and the other party to the marriage,”<sup>7</sup> and a rule of court repeats the requirement. But this is quite different from introducing such negative matter into an allegation. Still,—

§ 624. **Allegation not to show Bar.** — The complaint must be in terms which do not show the complainant to be also barred of his remedy.<sup>8</sup> If it does, he cannot have the divorce, even

<sup>1</sup> *Pastoret v. Pastoret*, 6 Mass. 276; *Lewis v. Lewis*, 9 Ind. 105; *Young v. Young*, 18 Minn. 90; *Edwards v. Edwards*, Phillips, N. C. 534. See, on this general subject, *Johnson v. Johnson*, 14 Wend. 637; *Haswell v. Haswell*, 1 Swab. & T. 502; *Backus v. Backus*, 3 Greenl. 136; *Davis v. Davis*, 19 Ill. 334; *Jeans v. Jeans*, 2 Harring. Del. 38; *Morrell v. Morrell*, 1 Barb. 318; *Wood v. Wood*, 2 Paige, 108; *Burdell v. Burdell*, 2 Barb. 473; *Burr v. Burr*, 2 Edw. Ch. 448.

<sup>2</sup> *Ante*, § 452, 456.

<sup>3</sup> *Rees v. Rees*, 3 Phillim. 387, 391, 1 Eng. Ec. 418, 419.

<sup>4</sup> *Croft v. Croft*, 3 Hag. Ec. 310, 5 Eng. Ec. 120, 125.

<sup>5</sup> *Elwes v. Elwes*, 1 Hag. Con. 269, 292, 4 Eng. Ec. 401, 411; *Beeby v. Beeby*, 1 Hag. Ec. 789, 794, 795, 3 Eng. Ec. 338, 341; *Durant v. Durant*, 1 Hag. Ec. 733, 751, 3 Eng. Ec. 310, 318, 319; *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 5 Eng. Ec. 28.

<sup>6</sup> *Ante*, § 576.

<sup>7</sup> 20 & 21 Vict. c. 85, § 41.

<sup>8</sup> *Crewe v. Crewe*, 3 Hag. Ec. 123, 125,

though a jury should find a verdict in his favor.<sup>1</sup> In the ecclesiastical practice, he might, if he chose, introduce into his libel whatever would make the history natural and consistent, and forestall suspicion of connivance; "for the party ought not to be forced ultimately to depend, for an explanation of his conduct, on the ingenuity of his counsel or the discrimination of the court."<sup>2</sup> The case may be such that his only safety is in this form of pleading; because,—

§ 625. **Bar appearing.**—If the matter of defence appears either by the complainant's own admissions upon the record, or by the testimony of his witnesses, the court of its own motion, or moved by the opposing counsel, will take the objection at the hearing.<sup>3</sup>

§ 626. **The Several Standard Defences,**—the law and evidence as to which have been explained in a series of chapters,<sup>4</sup> will now be separately considered in respect of the matter of the present sub-title. Seeming repetitions will appear in this method, but on the whole it is deemed best. Thus,—

§ 627. *Connivance*:—

**Already,**—in the chapter on this subject,<sup>5</sup> most of what might be appropriate here has been explained.

§ 628. **Not Pledged in Defence.**—It was doubted in the ecclesiastical practice whether a defendant could set up connivance merely on interrogatories put by himself to the plaintiff's witnesses. Certainly the evidence thus obtained must, to be effective, be unequivocal, and incapable of explanation; and the court will give the plaintiff opportunity to explain it if he can.<sup>6</sup> But evidently the rule for solving such a difficulty is that the party can ask nothing where he has not in due form pleaded the connivance, yet to protect the public the court will take such steps as the circumstances apparently require, and act upon evidence before it by whatever prompting brought to its notice.<sup>7</sup>

§ 629. *Condonation*:—

**Withdrawing from Cohabitation.**—Within the rule that the plaintiff's libel must not be so constructed as to show a bar,<sup>8</sup> it

5 Eng. Ec. 45, 46; Johnson v. Johnson, 1 Edw. Ch. 439.

<sup>1</sup> Moss v. Moss, 2 Ire. 55.

<sup>2</sup> Croft v. Croft, 3 Hag. Ec. 310, 312, 5 Eng. Ec. 120, 121.

<sup>3</sup> Ante, § 619; Crewe v. Crewe, 3 Hag. Ec. 123, 124, 5 Eng. Ec. 45, 46; Turton v. Turton, 3 Hag. Ec. 338, 5 Eng. Ec.

130; Smith v. Smith, 4 Paige, 432, 27 Am. D. 75.

<sup>4</sup> Ante, § 201-446.

<sup>5</sup> Ante, § 201-248.

<sup>6</sup> Turton v. Turton, 3 Hag. Ec. 338, 5 Eng. Ec. 130.

<sup>7</sup> Ante, § 619, 625; post, § 663, 664.

<sup>8</sup> Ante, § 624.

may doubtless be in terms to require the allegation that, on learning of the *delictum*, he withdrew from the cohabitation which otherwise would imply a condonation. Indeed, it appears sometimes to have been thought that ordinarily the libel must allege a separation.<sup>1</sup> But clearly this is not necessary. The modern English petition, framed by the judges, does not contain this allegation.<sup>2</sup> And in principle, when it is averred that while in cohabitation under the marriage the defendant committed an offence which justified its cessation, the inference would seem to be, not that it continued as though nothing had happened, but that it ceased; making the allegation under consideration unnecessary. At all events, the contrary would not be the *prima facie* aspect of the case. The ecclesiastical libel set out a withdrawal from cohabitation with the defendant, upon the last act of cruelty being inflicted,<sup>3</sup> or receiving knowledge of the adultery;<sup>4</sup> but not otherwise did it deny condonation. This form of pleading seems naturally to constitute a part of the voluminous allegations always encumbering a case where the evidence is taken in the way it is in those courts. And it was said that slight proof of this allegation is sufficient.<sup>5</sup> Further as to which, and with us,—

§ 630. **Negating — Withdrawing — Answer.** — Following the general rule,<sup>6</sup> the libel need not deny condonation.<sup>7</sup> And if circumspectly drawn, so that by its terms it will not show a bar, it may be silent as to any withdrawing from the cohabitation. A plea of condonation by the defendant may accompany a denial of the offence alleged against him.<sup>8</sup> And unless the defendant does plead it, he cannot rely upon it at the hearing.<sup>9</sup> Said Sir John Nicholl: “I know not of any case where condonation has been held to estop a party where it has not been pleaded.”<sup>10</sup> But,—

§ 631. **Judge taking Objection.** — By reason of the suit being triangular, and the public being a party to it,<sup>11</sup> a fact of condona-

<sup>1</sup> Burns v. Burns, 60 Ind. 259.

<sup>2</sup> Ante, § 576.

<sup>3</sup> Coote Ec. Pract. 356.

<sup>4</sup> Ib. 334.

<sup>5</sup> Dr. Lushington, in Caton v. Caton, 13 Jur. 431, 434.

<sup>6</sup> Ante, § 619, 621.

<sup>7</sup> Earp v. Earp, 1 Jones Eq. 239; Young v. Young, 18 Minn. 90.

<sup>8</sup> Smith v. Smith, 4 Paige, 432, 27 Am. D. 75; Wood v. Wood, 2 Paige, 108; Dil-

lon v. Dillon, 3 Curt. Ec. 86, 7 Eng. Ec. 377, 380.

<sup>9</sup> Smith v. Smith, 4 Paige, 432, 27 Am. D. 75; Adams v. Hurst, 9 La. 243; Timmings v. Timmings, 3 Hag. Ec. 76, 5 Eng. Ec. 22, 26; Jeans v. Jeans, 2 Harring. Del. 38.

<sup>10</sup> Durant v. Durant, 1 Hag. Ec. 733, 752, 3 Eng. Ec. 310, 319. But see Best v. Best, 1 Add. Ec. 411, 2 Eng. Ec. 158.

<sup>11</sup> Ante, § 479-489, 619.

tion appearing is fatal to the plaintiff's claim, though the defendant has not pleaded it; not because the latter has any just right to take the objection, but because public policy does not permit the divorce.<sup>1</sup> And the public, which does not plead, objects through the conscience of the judge.<sup>2</sup> Chancellor Walworth went so far as to say that if there is reason to believe this defence exists, the court, *ex officio*, may at any time before a final decree direct an inquiry to ascertain the fact.<sup>3</sup> Therefore,—

§ 632. **Ordering Inquiry.**—Where a master's report of the proofs left it doubtful whether there had not been a voluntary cohabitation after the plaintiff became aware of the last act of adultery charged, it having occurred after knowledge of several prior acts, a reference back was ordered to settle the question whether this last act was condoned.<sup>4</sup> But where a decree for divorce had been regularly entered against a husband, who was in the State prison for felony, and there was no doubt of his having committed the *delictum* alleged, the court would not open the decree to enable him to set up condonation.<sup>5</sup>

§ 633. **Evidence become Irrelevant.**—There was in the ecclesiastical practice another difficulty not liable to arise in the same form under our different procedure. A defendant in his interrogatories to the plaintiff's witnesses could inquire, not only into things alleged in the libel, but also into what he meant to charge in his responsive allegation thereafter to be produced. Then if he did not produce it, or if in the one he tendered he did not set up condonation, there was in the cause evidence rightfully drawn forth by a party who had no right to its use. What was

<sup>1</sup> Post, § 663, 664.

<sup>2</sup> North v. North, 5 Mass. 320; Timmings v. Timmings, 3 Hag. Ec. 76, 5 Eng. Ec. 22, 23; Snow v. Snow, 2 Notes Cas. Supp. 1, 12; Popkin v. Popkin, 1 Hag. Ec. 766, 3 Eng. Ec. 325.

<sup>3</sup> Smith v. Smith, 4 Paige, 432, 27 Am. D. 75. On no other principle could have proceeded the decision in Backus v. Backus, 3 Greenl. 136, a brief case and not apparently much considered; where, on a general traverse to the libel, and without special plea, the respondent was permitted to show a condonation of the adultery by subsequent cohabitation. The court is reported to have said that such evidence is always heard in any stage of the cause, even after a default. And see

Elwes v. Elwes, 1 Hag. Con. 269, 292, 4 Eng. Ec. 401, 411; Johnson v. Johnson, 1 Edw. Ch. 439. And see post, § 663, 664.

<sup>4</sup> Dodge v. Dodge, 7 Paige, 589. And see Pugsley v. Pugsley, 9 Paige, 589; Kane v. Kane, 3 Edw. Ch. 389; Dobbs v. Dobbs, 3 Edw. Ch. 377; Emmons v. Emmons, Walk. Mich. 532; Johnson v. Johnson, 14 Wend. 637.

<sup>5</sup> Hofmire v. Hofmire, 7 Paige, 60, 32 Am. D. 611; s. c. before the V. C., nom. Hoffmire v. Hoffmire, 3 Edw. Ch. 173. And see Smith v. Smith, 4 Paige, 432, 27 Am. D. 75. For the contrary doctrine to that maintained in this section, see Lewis v. Lewis, 9 Ind. 105.



the consequence? Two propositions seem on the whole to have been established, — first, that the court would give the plaintiff an opportunity to explain; secondly, that on the “clearest and most conclusive evidence” of condonation, the divorce would be withheld.<sup>1</sup> Still,—

§ 634. **Inferred from Pleadings.**—When condonation is deducible from the pleadings, the rule which requires the clearest and most conclusive evidence of it appears not to be applied.<sup>2</sup> Again,—

§ 635. **Burden of Proof changed.**—The peculiar form of the plaintiff’s allegation may cast on him the burden of affirmatively showing that there was no condonation; as, it seems, if a husband avers that the wife slept at his house the night after she to his knowledge committed adultery, he must prove that he did not sleep with her.<sup>3</sup> But this method of charging the offence, appropriate in the ecclesiastical practice, will rarely or never be followed in ours.

§ 636. *Recrimination*:—

**Plea and Proof.**—A defendant, to avail himself of this defence, must plead and prove it.<sup>4</sup> Even where, in the chancery practice, there is no plea of any sort, but the bill is taken *pro confesso*, evidence of recrimination has been adjudged inadmissible on the hearing before the master.<sup>5</sup> The plea may be joined with a denial of guilt.<sup>6</sup> And—

§ 637. **After Suit begun.**—If the plaintiff commits adultery after the giving in of the defendant’s plea or answer, the latter on reasonable application will have leave to set it up in plea, or in a supplemental answer, or by a cross-bill in the nature of a plea *puis darrein continuance*.<sup>7</sup> Even, it has been intimated, and such is the rule in principle, if the plaintiff after a verdict in his favor but before a decree contracts a second marriage and

<sup>1</sup> *Durant v. Durant*, 1 Hag. Ec. 733, 3 Eng. Ec. 310, 317, 319; *Snow v. Snow*, 2 Notes Cas. Supp. 1, 11; *Turton v. Turton*, 3 Hag. Ec. 338, 5 Eng. Ec. 130; *Beeby v. Beeby*, 1 Hag. Ec. 789, 795, 3 Eng. Ec. 338, 341; *Elwes v. Elwes*, 1 Hag. Con. 269, 292, 4 Eng. Ec. 401, 411.

<sup>2</sup> *Snow v. Snow*, 2 Notes Cas. Supp. 1.

<sup>3</sup> *Timmings v. Timmings*, 3 Hag. Ec. 76, 5 Eng. Ec. 22, 26; *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377, 390. And see *Johnson v. Johnson*, 1 Edw. Ch. 439.

<sup>4</sup> *Smith v. Smith*, 4 Paige, 432, 27 Am.

D. 75; *Pastoret v. Pastoret*, 6 Mass. 276; *Jones v. Jones*, 3 C. E. Green, 33, 90 Am. D. 607.

<sup>5</sup> *Johnson v. Johnson*, 14 Wend. 637.

<sup>6</sup> *Smith v. Smith*, *supra*; *Hopper v. Hopper*, 11 Paige, 46; *Forster v. Forster*, 1 Hag. Con. 144, 4 Eng. Ec. 358; *Wood v. Wood*, 2 Paige, 108. See post, § 663, 664.

<sup>7</sup> *Smith v. Smith*, 4 Paige, 432, 27 Am. D. 75; *Brisco v. Brisco*, 2 Add. Ec. 259, 2 Eng. Ec. 294.

cohabits under it, he can have no benefit from the verdict;<sup>1</sup> the rule being that adultery committed at any time before sentence bars the right to a divorce.<sup>2</sup> Such is the law as between the parties. As to the—

§ 638. **Public Interests.** — We have an intimation that the court will not protect the public to the same extent in respect of this defence as of some others, by taking notice of what is not pleaded. “This,” said Green, Ch., “is a suit *inter partes*; and the court cannot lay hold of any matter not properly put in issue, on the ground that public policy and public morals require it. Collusion of the kind where both parties conspire to impose upon the court, and fraudulently to procure a release from their marriage vows, against the provisions and policy of the law, is a very different case.”<sup>3</sup> It is obvious on reflection that a divorce to one of two equally guilty parties is just as distinctly “against the provisions and policy of the law” as any other divorce which the law forbids. Therefore we may doubt whether this suggestion should be deemed otherwise than exceptional, not to be generally followed.

§ 639. *Delay in bringing Suit:* —

**How Libel.** — We have seen that in the absence of any statute of limitations applicable to divorce, delay in bringing the suit is not alone a bar, yet sometimes the court requires it to be accounted for, withholding the relief when the explanation is not satisfactory.<sup>4</sup> In the ecclesiastical practice, the libel sometimes contained averments explanatory of the delay, — a permissible course,<sup>5</sup> yet witnesses were not examined to them unless the defence was of a sort rendering explanation essential.<sup>6</sup> Sometimes the court required from the plaintiff an affidavit of reasons for his delay.<sup>7</sup> In a New Hampshire case, the judge observed: “The extreme cruelty complained of was eight years prior to the application for the divorce, and no reason is assigned why an earlier application was not made, which should have been given”

<sup>1</sup> *Stanford v. Stanford*, 1 Edw. Ch. 317.

<sup>2</sup> *Brisco v. Brisco*, supra; *Smith v. Smith*, supra.

<sup>3</sup> *Jones v. Jones*, 3 C. E. Green, 33, 34, 90 Am. D. 607.

<sup>4</sup> Ante, § 413 et seq.

<sup>5</sup> *Mortimer v. Mortimer*, 2 Hag. Con. 310.

<sup>6</sup> *Richardson v. Richardson*, 1 Hag. Ec. 6, 3 Eng. Ec. 13. And see *Valleau v. Valleau*, 6 Paige, 207; *Fellows v. Fellows*, 8 N. H. 160.

<sup>7</sup> *Loader v. Loader*, cited in *Gilpin v. Gilpin*, 3 Hag. Ec. 150, 5 Eng. Ec. 58, 60.

in the libel.<sup>1</sup> In principle, in our practice, the allegations of the plaintiff should not contain matter showing a bar;<sup>2</sup> while, on the other hand, they need present only a *prima facie* case.<sup>3</sup> Doubtless, in our practice, there may be circumstances in which the judicious pleader will deem it practically wise to introduce into his libel an explanation of the delay, but it would be difficult to find any analogies from the unwritten law of pleading rendering such an allegation legally essential. The explanation can never be a necessary part of the required *prima facie* case. As to—

§ 640. **Statutes of Limitation.**—It is a familiar rule that these statutes, to avail a defendant, must be pleaded by him.<sup>4</sup> There is no reason to doubt that this rule extends to divorce causes.

## VI. *The Subsequent Pleadings.*

§ 641. **Equity.**—Where the divorce suit is in equity, the pleadings, as well subsequent to the bill as in the bill itself, will commonly take the forms customary in equity suits in the same court,—not needing explanations here.<sup>5</sup>

§ 642. **A Code Procedure,**—which in some of the States is applied to divorce, commonly explains itself. Or it is best learned from the books of local practice.

§ 643. **Proceeding by Libel.**—In a part of the States, the statutes have committed the jurisdiction to a common-law court, without particularly defining the procedure. Then ordinarily the plaintiff's complaint is termed a libel, and the procedure is supposed to have some analogy to the ecclesiastical, of which in the forming periods of our practice our courts had little or no knowledge.<sup>6</sup> To the complaint there ought properly to be, not in the ecclesiastical sense as evidence,<sup>7</sup> but as a pleading, an—

§ 644. **Answer—Loose Practice.**—Largely, in this class of States, the practice thus established by usage has been and remains very loose. For example, in Maine it was by the court

<sup>1</sup> *Fellows v. Fellows*, 8 N. H. 160, 162.  
And see *McCafferty v. McCafferty*, 8 Blackf. 218.

<sup>2</sup> Ante, § 624.

<sup>3</sup> Even an indictment need show only a *prima facie* offence. 1 Bishop Crim. Proc. § 325, 326, 403–405.

<sup>4</sup> *De Beauvoir v. Owen*, 5 Exch. 166, 167; *Emmons v. Hayward*, 11 Cush. 48.

<sup>5</sup> As to the answer in equity, see *Hopper v. Hopper*, 11 Paige, 46.

<sup>6</sup> Ante, § 461.

<sup>7</sup> Ante, § 452.

observed that "the strict rules of pleading, applicable to common-law cases, have not been followed in libels for divorce."<sup>1</sup> And in New Hampshire: "There are here usually no pleadings in the case even of contested libels. If objections are made to the libel itself, they are usually taken advantage of by a motion to dismiss the libel. So, if the libellant is negligent in prosecuting his suit, the remedy is by a motion to dismiss for want of prosecution."<sup>2</sup> There are probably other States wherein the practice is equally loose. And still,—

§ 645. **Necessary or Permissible.**—Where usage has thus made the formal answer unnecessary, the consequence does not follow that it is not permissible. And plainly, by a just view of the law, as well in the courts which suffer this loose practice as in the others, where the defendant relies on some special matter,—for example, connivance, collusion, or condonation,—he must, as already explained,<sup>3</sup> in some way allege it. And—

§ 646. **Further of Pleadings.**—Inevitably, in all classes of practice, some decent regard ought in these cases to be paid to the ordinary practice of the court.<sup>4</sup> Thus,—

§ 647. **Demurrers,**—universal in all forms of litigation, are of course proper in divorce practice.<sup>5</sup>

§ 648. **Further of Answer.**—Not as evidence but as a pleading,<sup>6</sup> the answer in some form is in most of our States required.<sup>7</sup> We have seen what is its form in the modern divorce practice in England.<sup>8</sup> In equity, it may be by a sort of tender of general issue and a simple denial of the allegations of the libel; or it may be by setting up some special matter, such as condonation, or the like. And with the general denial may be joined the special matter. Thus, a defendant negating the adultery

<sup>1</sup> *Vance v. Vance*, 17 Me. 203, 204.

<sup>2</sup> *Brown v. Brown*, 37 N. H. 536, 538, opinion by Bell, J.

<sup>3</sup> Ante, § 619, 621–623, 630, 636, 637, 640.

<sup>4</sup> And see further on this subject, *Ewing v. Ewing*, 2 Philad. 371, bottom paging, where it was held that a plea and a demurrer could not be put in at the same time; *Turner v. Turner*, 3 Greenl. 398; *Jones v. Jones*, 18 Me. 308, 36 Am. D. 723; *Ristine v. Ristine*, 4 Rawle, 460; *Morrell v. Morrell*, 3 Barb. 236; *Wilson v. Wilson*, Law Rep. 2 P. & M. 292. When

the answer to be filed in Indiana, *Phillips v. Phillips*, 5 Ind. 190. Striking out answer in New York, *Brisbane v. Brisbane*, 67 How. Pr. 184.

<sup>5</sup> *Pagani v. Pagani*, Law Rep. 1 P. & M. 223; *Rice v. Rice*, 13 Or. 337; *Steel v. Steel*, 104 N. C. 631.

<sup>6</sup> Ante, § 643, 644.

<sup>7</sup> *Orrok v. Orrok*, 1 Mass. 341; *Allen v. Allen*, Hemp. 58; *Ristine v. Ristine*, 4 Rawle, 460; *Hesler v. Hesler*, Wright, 210; *Mosser v. Mosser*, 29 Ala. 313; *Richmond v. Richmond*, 10 Yerg. 343.

<sup>8</sup> Ante, § 577.

charged in the libel may at the same time allege condonation or recrimination.<sup>1</sup> And in like manner, under whatever practice, a defendant may plead connivance without admitting the truth of the plaintiff's allegation, or may join such plea with a denial of guilt.<sup>2</sup> And without plea the special defence cannot as of right in the party be proved.<sup>3</sup>

§ 649. **Recriminatory Adultery** — must, in the answer, be set out with the same particularity as when it is made ground for a divorce.<sup>4</sup> So also it must be proved by the same evidence.<sup>5</sup>

§ 650. **Collusion.** — “I think,” said the learned judge ordinary of the plea of collusion in an English case, “it is by no means necessary to state the facts that are intended to be proved. But the character of the collusion pleaded should be given as by way of particulars; whether, for instance, it is meant that a sham case has been set up, or that the parties are acting in concert to prove a real one.”<sup>6</sup>

§ 651. **Pleadings still subsequent** — to these will in proper cases be required;<sup>7</sup> as, in —

§ 652. **Condonation.** — Where a defendant pleads condonation, if the plaintiff would avoid its effect by showing subsequent misconduct, he must set it up in answer to the plea.<sup>8</sup>

§ 653. **Facts after Suit commenced** — will sometimes transpire, requiring a plea to introduce them to the court,<sup>9</sup> but herein divorce cases do not differ from others.

### § 654. *The Doctrine of this Chapter restated.*

There are fundamental principles of pleading which, pertaining alike to all systems, are observed equally in all courts and in all sorts of litigation. Besides which, every court has its special rules and peculiar practice. The doctrines of this chapter are the results of blendings of these two propositions.

<sup>1</sup> Wood v. Wood, 2 Paige, 108.

<sup>2</sup> Rogers v. Rogers, 3 Hag. Ec. 57, 5 Eng. Ec. 13; Forster v. Forster, 1 Hag. Con. 144, 4 Eng. Ec. 358, 360; Moorsom v. Moorsom, 3 Hag. Ec. 87, 5 Eng. Ec. 28; Gilpin v. Gilpin, 3 Hag. Ec. 150, 5 Eng. Ec. 58; Austin v. Austin, 10 Conn. 221.

<sup>3</sup> Lewis v. Lewis, 9 Ind. 105. See post, § 663, 664.

<sup>4</sup> Morrell v. Morrell, 1 Barb. 318; Wood v. Wood, 2 Paige, 108; Burr v.

Burr, 2 Edw. Ch. 448; Garrett v. Garrett, 12 Ind. 407; Holston v. Holston, 23 Ala. 777; Reid v. Reid, 6 C. E. Green, 331.

<sup>5</sup> Ante, § 387; Reid v. Reid, supra.

<sup>6</sup> Jessop v. Jessop, 2 Swab. & T. 301, 303.

<sup>7</sup> Leslie v. Leslie, 11 Abb. Pr. n. s. 311.

<sup>8</sup> Jeans v. Jeans, 2 Harring. Del. 38.

<sup>9</sup> Ante, § 565, 567, 568; Burdell v. Burdell, 2 Barb. 473.

## CHAPTER XX.

## THE COURT AND THE ORDINARY STEPS THEREIN.

- § 655, 656. Introduction.
- 657-661. The Court.
- 662-665. Nature of Issue.
- 666-670. Steps preparatory to Trial.
- 671-673. Amendments.
- 674-677. The Trial.
- 678-686. New Trials and Appeals.
- 687, 688. Death and Discontinuances.
- 689. Doctrine of Chapter restated.

§ 655. **What for this Chapter.** — It is not the purpose of this chapter to anticipate, even in part, the topics which will occupy us in the remaining chapters of the volume. We shall only bring under brief contemplation some of the common steps not within the scope of the future elucidations.

§ 656. **How divided.** — We shall consider, I. The Court; II. The Nature of the Issue; III. Steps preparatory to the Trial; IV. Amendments; V. The Trial; VI. New Trials and Appeals; VII. Death and Discontinuances.

I. *The Court.*

§ 657. **Provided by Statute.** — As explained in the first volume, when we derived from England our unwritten law, divorce causes were there heard in the ecclesiastical courts. These courts we have not and never had. So that, with us, all divorce jurisdiction comes from statutes which specify in what tribunal the trial shall be.<sup>1</sup> The exceptions are alimony without divorce, which in some States is without statutory aid granted by the equity tribunals,<sup>2</sup> and some of the suits for nullity.<sup>3</sup>

<sup>1</sup> Vol. I. § 115-149. And see Stokes  
v. Stokes, 1 Misso. 320.

<sup>2</sup> Vol. I. § 1393-1401.

<sup>3</sup> Post, c. 24.

§ 658. **Common Law — Equity.** — By statutes, when law and equity were more generally than now administered in our States in separate tribunals, the divorce jurisdiction was commonly given to those of equity, but sometimes to the common-law courts. Even —

§ 659. **Probate Courts** — have in some of our States, exceptionally, been intrusted with divorce jurisdiction.<sup>1</sup>

§ 660. **A Military Commission** — has no jurisdiction for divorce.<sup>2</sup>

§ 661. **Particular Court and County.** — Cases cited in the note will in a measure explain what has been held in our States as to what particular court has the divorce jurisdiction, in what county the suit shall be brought, and the like.<sup>3</sup>

## II. *The Nature of the Issue.*

§ 662. **Epitomized.** — Partly to repeat what is said in preceding and subsequent chapters, the plaintiff is to allege and prove his marriage, and the breach of it which entitles him to the remedy sought. Thereupon he may have his divorce unless the defendant sets up and proves either, first, connivance, which may embrace some facts belonging also under the head of collusion; or, secondly, collusion; or, thirdly, condonation; or, fourthly, recrimination; or, fifthly, unless the right is lost by lapse of time, or by what is called the plaintiff's insincerity. And the plaintiff is entitled to the divorce equally as against intervening third persons, unless they establish some one of these defences. The special peculiarity of this suit relates to the —

§ 663. **Public.** — The public, which we have seen to be a party

<sup>1</sup> Stebbins v. Anthony, 5 Colo. 348.

<sup>2</sup> S. v. Stillman, 7 Coldw. 341.

<sup>3</sup> Sharman v. Sharman, 18 Tex. 521; Reese v. Reese, 23 Ala. 785; Wiley v. Wiley, 27 Ala. 704; Conant v. Conant, 10 Cal. 249, 70 Am. D. 717; Sanford v. Sanford, 5 Day, 353; Forrest v. Forrest, 6 Duer, 102; Fischli v. Fischli, 1 Blackf. 360, 12 Am. D. 251; Varner v. Varner, 3 Blackf. 163; Smith v. Smith, 4 Blackf. 132; Fulton v. Fulton, 36 Missis. 517; Holloman v. Holloman, 2 Dev. & Bat. Eq. 270; Mattox v. Mattox, 2 Ohio, 233, 15 Am. D. 547; Light v. Light, 17 S. & R. 273; Moore v. Moore, 2 Mass. 117; Lane v. Lane, 2 Mass. 167; Richardson v. Rich-

ardson, 2 Mass. 153; Squire v. Squire, 3 Mass. 184; Hopkins v. Hopkins, 3 Mass. 158; Carter v. Carter, 6 Mass. 263; Merry v. Merry, 12 Mass. 312; Williams v. Dormer, 16 Jur. 366, 9 Eng. L. & Eq. 598; Richmond v. Richmond, 10 Yerg. 343; Herron v. Herron, 16 Ind. 129; Gilbert v. Thomas, 3 Kelly, 575; Rice v. Tarver, 4 Ga. 571, 582; Pennington v. Pennington, 10 Philad. 22; Clark v. Slaughter, 38 Missis. 64; Forrest v. Forrest, 25 N. Y. 501; Worth v. Worth, 4 Kan. 223; Moe v. Moe, 39 Wis. 308; Banister v. Banister, 150 Mass. 280; Schooler v. Schooler, 77 Ga. 601; Canniff v. Canniff, 49 Mich. 478; Sharon v. Sharon, 67 Cal. 185.

in all divorce suits,<sup>1</sup> occupies a unique position, sometimes embarrassing to the court. It does not ordinarily appear by counsel, and when without counsel does not plead. As against this party, when only thus represented by what is called the conscience of the court,<sup>2</sup> the plaintiff is entitled to the decree on his case being duly and fully proved. But this party, unlike the others, never loses a right by laches;<sup>3</sup> and so, whenever a defence comes out in the evidence, whether alleged or not, it is fatal to the proceeding.<sup>4</sup> A maxim in these suits, therefore, is that a cause is never concluded as against the judge;<sup>5</sup> and the court may, and to satisfy its conscience sometimes does, of its own motion, go into the investigation of facts not contested by pleadings.<sup>6</sup>

§ 664. **The Limit** — to the right of the public to be protected while thus disregarding the just and common practice of the court cannot be precisely defined by rule. The judge, keeping in view the precedents, with his "conscience" always awake, should see that while the record parties are not deprived of the justice of the law, the public good, which suffers from every dishonest divorce, and from every one not as well within the spirit of the statute as its terms, is not sacrificed. A rule more exact than this does not appear to be in the nature of the case possible.<sup>7</sup>

§ 665. **The "Issue,"** — in the more technical meaning of the word, would seem in reason to be required, properly made up and appearing of record, in these divorce cases the same as in others. The last sub-title of the last chapter explains how in fact is

<sup>1</sup> Ante, § 479-498.

<sup>2</sup> Ante, § 496.

<sup>3</sup> Partly analogous to this doctrine is that in criminal procedure, by which there can be no nonsuit against the government; because it is said to be always present in court. *Rex v. Adamson*, Savile, 56; 1 Bishop Crim. Proc. § 961.

<sup>4</sup> *Crewe v. Crewe*, 3 Hag. Ec. 123, 5 Eng. Ec. 45, 46; *Phillips v. Phillips*, 1 Rob. Ec. 144, 156; *Turton v. Turton*, 3 Hag. Ec. 338, 5 Eng. Ec. 130; *Elwes v. Elwes*, 1 Hag. Con. 269, 4 Eng. Ec. 401, 411, 412; *Lovering v. Lovering*, 3 Hag. Ec. 85, 5 Eng. Ec. 27; *Mattox v. Mattox*, 2 Ohio, 233, 15 Am. D. 547; *Smith v. Smith*, 4 Paige, 432, 27 Am. D. 75; *Suggate v. Suggate*, 1 Swab. & T. 492; *Curtis v. Curtis*, 4 Swab. & T. 234; *Davis v.*

*Maxwell*, 12 Met. 286, 289; *Light v. Light*, 1 Watts, 263.

<sup>5</sup> *Halford v. Halford*, 3 Phillim. 98, 103, *Hamerton v. Hamerton*, 2 Hag. Ec. 8, 24, note, 4 Eng. Ec. 13, 20. And see *Middleton v. Middleton*, 2 Hag. Ec. Supp. 134, 4 Eng. Ec. 299, 301; *Donellan v. Donellan*, 2 Hag. Ec. Supp. 144, 4 Eng. Ec. 304.

<sup>6</sup> Ante, § 619, 631; *Smith v. Smith*, 4 Paige, 432; *Morrell v. Morrell*, 3 Barb. 236. But see *Lewis v. Lewis*, 9 Ind. 105, which, however, is not in accord with the general doctrine. See, also, *Plumer v. Plumer*, 4 Swab. & T. 257. The reader will find illustrations of this doctrine under a variety of titles in the present volume.

<sup>7</sup> And see ante, § 497, 631-634.



the practice as to this, or in some of our courts the absence of practice.<sup>1</sup>

### III. *Steps preparatory to the Trial.*

§ 666. **Orders** — of various sorts may be made within the general principles of practice in other causes.<sup>2</sup> To illustrate, —

§ 667. **Delivery and Inspection of Papers** — will in proper circumstances be compelled by the court.<sup>3</sup>

§ 668. **In another State.** — We have seen that the pendency of divorce proceedings in another State is not in law a bar to a suit here.<sup>4</sup> But there is authority for enjoining the parties, in a suit here pending, from carrying on a like litigation in another State.<sup>5</sup>

§ 669. **After Default.** — By reason of the public interest in a divorce cause,<sup>6</sup> the court should be specially inclined to set aside a default. On which ground, for example, the California Court held that for this no affidavit of merits will be required.<sup>7</sup>

§ 670. **Bill of Particulars.** — In divorce causes as in others, the court will in proper circumstances order a bill of the particulars of what a party has pleaded in general terms. The practice is the same which is familiar in other suits.<sup>8</sup>

### IV. *Amendments.*

§ 671. **The Pleadings,** — including the libel or petition, may be amended in these suits, on the like principles as in ordinary civil causes, and under the like restrictions.<sup>9</sup>

<sup>1</sup> Ante, § 641–653. Consult also Errissman v. Errissman, 25 Ill. 136; Wilson v. Wilson, Law Rep. 2 P. & M. 353; Walgrove v. Walgrove, 3 Edw. Ch. 227; Weatherbee v. Weatherbee, 20 Wis. 499; Price v. Price, 9 Abb. Pr. N. S. 291; Bancroft v. Bancroft, 4 Swab. & T. 84; Derringer v. Derringer, 8 Philad. 269; Brown v. Brown, 37 N. H. 536, 75 Am. D. 154; Shaw v. Shaw, 2 Swab. & T. 642; Waldron v. Waldron, 55 Pa. 231; Snowball v. Snowball, Law Rep. 2 P. & M. 263; Oades v. Oades, 6 Neb. 304.

<sup>2</sup> Moyers v. Moyers, 11 Heisk. 495; Spofford v. Smith, 55 N. H. 228; Howarth v. Howarth, 11 P. D. 95; Clark v. Clark, 13 Daly, 497.

<sup>3</sup> Shaw v. Shaw, 2 Swab. & T. 642;

Winscom v. Winscom, 3 Swab. & T. 380, 383, note; Pollard v. Pollard, 3 Swab. & T. 613.

<sup>4</sup> Ante, § 188.

<sup>5</sup> Kittle v. Kittle, 8 Daly, 72; Nichols v. Nichols, 12 Hun, 428.

<sup>6</sup> Ante, § 663, 664.

<sup>7</sup> McBlain v. McBlain, 77 Cal. 507.

<sup>8</sup> Leete v. Leete, 2 Swab. & T. 568; Huston v. Huston, 63 Me. 184, 187; Realf v. Realf, 77 Pa. 31; Brinckle v. Brinckle, 10 Philad. 144; Hunt v. Hunt, 2 Swab. & T. 574; Codrington v. Codrington, 3 Swab. & T. 368; Harrington v. Harrington, 107 Mass. 329; Rie v. Rie, 34 Ark. 37.

<sup>9</sup> Cartledge v. Cartledge, 4 Swab. & T. 249; Wright v. Wright, 1 Swab. & T.

§ 672. **Proceedings.**—The courts, in all sorts of litigation, to protect the parties from injury by surprise and other similar things, rescind their interlocutory orders, permit further evidence to be taken after publication, and the like, when justice commands and a sound policy permits; but there is little connected with divorce, as to these things, inviting special mention.<sup>1</sup>

§ 673. **Continuances to supply Defects.**—In proper circumstances where justice requires, the courts in divorce causes are liberal in allowing continuances and suspensions of the hearing, to supply defects in the evidence and pleadings. The public is not interested to interpose technical obstructions. Of all causes, there are none wherein more than these the exact and real truth should on every account be made to appear.<sup>2</sup>

### V. *The Trial.*

§ 674. **Open Court or not.**—As a general rule, wherever the common law prevails, trials in all causes are in open court, to which spectators are admitted.<sup>3</sup> This method is regarded as required for the purity of our judicial system, and as a precaution against possible injustice. In reason and in the ordinary practice, it extends to divorce causes.<sup>4</sup> But the evidence, occasionally of adultery, and commonly of impotence, is quite unfit for a promiscuous audience. Still the English Divorce Court deems itself not authorized to try *in camera*, even with the consent of parties, any divorce cause not within the former ecclesiastical jurisdiction, and not by the ecclesiastical courts heard in

80; Fishli v. Fishli, 2 Litt. 337; Klein v. Klein, 11 Abb. Pr. n. s. 450, 42 How. Pr. 166; Errissman v. Errissman, 25 Ill. 136; Toone v. Toone, 10 Philad. 174; Parkinson v. Parkinson, Law Rep. 2 P. & M. 27; Hackney v. Hackney, 9 Humph. 450; Grove's Appeal, 37 Pa. 443; Foy v. Foy, 13 Ire. 90; Tourtelot v. Tourtelot, 4 Mass. 506; Rowley v. Rowley, 1 Swab. & T. 487; Spilsbury v. Spilsbury, 3 Swab. & T. 210; Green v. Green, 26 Mich. 437, 439; Shay v. Shay, 9 Philad. 521; Crocker v. Crocker, Sheldon, 274; Schaffberg v. Schaffberg, 52 Mich. 429; Lapington v. Lapington, 14 P. D. 21; Miller v. Miller, 13 Stew. Ch. 475; P. v. McCaffrey, 75 Mich. 115; Robertson v. Robertson, 9 Daly, 44;

Whipp v. Whipp, 54 N. H. 580; Inskeep v. Inskeep, 5 Iowa, 204.

<sup>1</sup> Hamerton v. Hamerton, 2 Hag. Ec. 618, 4 Eng. Ec. 224; Durant v. Durant, 2 Add. Ec. 267, 2 Eng. Ec. 298; Friend v. Friend, Wright, 639; Chamberlain v. Chamberlain, 2 Aikens, 232; Ashley v. Ashley, 2 Swab. & T. 388; Pain v. Pain, 80 N. C. 322.

<sup>2</sup> Parkinson v. Parkinson, Law Rep. 2 P. & M. 27; Foster v. Redfield, 50 Vt. 285; Moore v. Moore, 22 Tex. 237, 241; M. v. H. 3 Swab. & T. 592; Savage v. Savage, 10 Or. 331.

<sup>3</sup> 1 Bishop Crim. Proc. § 957-959.

<sup>4</sup> Bacon v. Bacon, 34 Wis. 594. So provided by statute in Iowa, Hobart v. Hobart, 45 Iowa, 501.

private. But offensive nullity cases are said to have been sometimes privately heard by those tribunals, and the Divorce Act expressly empowers the new court to follow their practice within their former jurisdiction. This does not extend to any suits for the dissolution of valid marriage.<sup>1</sup> In some of our States, we have statutes confirmatory of the common-law rule of an open hearing.<sup>2</sup> And the author has elsewhere suggested that where the law requires a hearing to be open, the court may probably exclude persons of immature age, and perhaps other improper persons.<sup>3</sup> Perhaps, also, in the absence of a restraining statute, and in consideration of the practice in England when we received thence our unwritten law, a judge with us might deem himself authorized, particularly if the parties requested, to hear an offensive case of impotence strictly in private.

§ 675. **Court or Jury.** — There was no jury in the ecclesiastical courts, the judge always passing upon both the law and the facts.<sup>4</sup> And this is believed to be the unvarying course in this country, except where a statute directly or by implication provides for a jury trial. In most of our States, not all, the trial by jury is by statute directed either absolutely or at the election of a party. And where the proceeding is in equity, the court sometimes, it seems without statutory command, orders a feigned issue to be sent to a jury, as in other equity causes; <sup>5</sup> in which case, the verdict is not binding absolutely as at common law, but is advisory to the judge.<sup>6</sup>

§ 676. **Referring.** — Divorce causes are sometimes in some of

<sup>1</sup> *H. v. C.* 1 Swab. & T. 605; *A. v. A.* Law Rep. 3 P. & M. 230; *C. v. C.* Law Rep. 1 P. & M. 640; *Barnett v. Barnett*, 29 Law J. n. s. Mat. 28.

<sup>2</sup> *Cross v. Cross*, 55 Mich. 280.

<sup>3</sup> 1 Bishop Crim. Proc. § 959.

<sup>4</sup> Vol. I. § 110; ante, § 531.

<sup>5</sup> On the various questions above and the like, consult *Morrell v. Morrell*, 1 Barb. 318; *Oliver v. Oliver*, 20 Mo. 261; *Carre v. Carre*, 2 Yeates, 207; *Miles v. Miles*, 2 Jones Eq. 21; *Richmond v. Richmond*, 10 Yerg. 343; *Wood v. Wood*, 5 Ire. 674; *Devanbagh v. Devanbagh*, 5 Paige, 554, 28 Am. D. 443; *Reavis v. Reavis*, 1 Scam. 242; *Stokes v. Stokes*, 1 Misso. 320; *Harrison v. Harrison*, 7 Ire. 438; *Bacon v. Bacon*, 2 Swab. & T. 53; *Smith v. Smith*, 4 Paige, 432, 27 Am. D.

75; *Mead v. Mead*, 1 Mo. Ap. 247; *Madison v. Madison*, 1 Wash. 60; *Morse v. Morse*, 25 Ind. 156; *Wadsworth v. Wadsworth*, 40 Iowa, 448; *Deitz v. Deitz*, 4 Thomp. & C. 565; s. c. nom. *Dietz v. Dietz*, 2 Hun, 339; *Coffin v. Coffin*, 55 Me. 361; *Anonymous*, 35 Ala. 226; *Brinkley v. Brinkley*, 56 N. Y. 192; *Hobart v. Hobart*, 51 Iowa, 512; *Morrell v. Morrell*, 17 Hun, 324; *Allison v. Allison*, 46 Pa. 321; *Galusha v. Galusha*, 43 Hun, 181; *Poertner v. Poertner*, 66 Wis. 644; *Conderman v. Conderman*, 44 Hun, 181. The English Divorce Act permits trial by jury. *Marchmont v. Marchmont*, 1 Swab. & T. 228.

<sup>6</sup> *Beck v. Beck*, 6 Mont. 318; *Gilpin v. Gilpin*, 12 Colo. 504.

the States committed for a special purpose, such as to take the evidence, to a master or a referee.<sup>1</sup> But this power is limited. And except where the proceeding is in equity, or even then, it is generally dependent on a statute, the terms of which it will not be permitted to exceed.<sup>2</sup> Not in all of our States, it appears, is this practice in any degree allowable.<sup>3</sup>

§ 677. **The Finding**—by the court or jury, its form, and the disposition to be made of it, have become the subject of some reported cases, but a mere reference to them will suffice.<sup>4</sup>

## VI. *New Trials and Appeals.*

### § 678. *Rehearing in same Court:*—

**Grantable.**—There is no reason why, in proper circumstances, new trials should not be granted in divorce causes the same as in others; and in general they will be.<sup>5</sup> And the ordinary rules for new trials will govern them.<sup>6</sup> Thus,—

<sup>1</sup> Pollock v. Pollock, 71 N. Y. 137; Harding v. Harding, 53 How. Pr. 238; Anonymous, 3 Abb. N. Cas. 161; Wightman v. Wightman, 4 Johns. Ch. 343; Bacon v. Bacon, 34 Wis. 594; Price v. Price, 9 Abb. Pr. n. s. 291; Cooledge v. Cooledge, 1 Barb. Ch. 77; Forrest v. Forrest, 3 Bosw. 661; Cook v. Cook, 2 Beasley, 263; Morrell v. Morrell, 17 Hun, 324; Stevens v. Stevens, 1 McCarter, 374; Belton v. Belton, 11 C. E. Green, 449; Hart v. Hart, 2 Edw. Ch. 207; Dobbs v. Dobbs, 3 Edw. Ch. 377; Fairbanks v. Fairbanks, 2 Edw. Ch. 208; Renwick v. Renwick, 10 Paige, 420; Graves v. Graves, 2 Paige, 62; Dodge v. Dodge, 7 Paige, 589; Shillinger v. Shillinger, 14 Ill. 147; Pugsley v. Pugsley, 9 Paige, 589; Moore v. Moore, 56 N. H. 512; Rand v. Rand, 56 N. H. 421; Stone v. Stone, 1 Stew. Ch. 409; Ross v. Ross, 31 Hun, 140; Bliss v. Bliss, 13 Daly, 489.

<sup>2</sup> Hobart v. Hobart, 45 Iowa, 501; McCrea v. McCrea, 58 How. Pr. 220; Candy v. Candy, 9 Philad. 516; Merrill v. Merrill, 11 Abb. Pr. n. s. 74; Baker v. Baker, 10 Cal. 527; Simmons v. Simmons, 3 Rob. N. Y. 642; Deitz v. Deitz, 4 Thomp. & C. 565; s. c. nom. Dietz v. Dietz, 2 Hun, 339.

<sup>3</sup> Mangels v. Mangels, 6 Mo. Ap. 481. As to taking a divorce case out of court

and referring it, see Hooper v. Hooper, 3 Swab. & T. 251.

<sup>4</sup> Pollock v. Pollock, 71 N. Y. 137; Hobart v. Hobart, 51 Iowa, 512; Dolby v. Dolby, 2 Swab. & T. 228; Smith v. Smith, 72 N. C. 139; Blott v. Rider, 47 How. Pr. 90; Haygood v. Haygood, 25 Tex. 576; Morse v. Morse, 25 Ind. 156; Simpson v. Simpson, 25 Ark. 487; Gernon v. Hickey, 18 La. An. 454; Stokes v. Stokes, 1 Misso. 320; Jernigan v. Jernigan, 37 Tex. 420; Fuller v. Fuller, 17 Cal. 605; Smith v. Johnson, 2 Heisk. 225; Trumpy v. Trumpy, 43 Conn. 270; Bamford v. Bamford, 4 Or. 30; Cassidy v. Cassidy, 63 Cal. 352; Schmitt v. Schmitt, 31 Minn. 106.

<sup>5</sup> Hitchcock v. Hitchcock, 2 Swab. & T. 513; Morphet v. Morphet, Law Rep. 1 P. & M. 702; Rindge v. Rindge, 22 Ind. 31; Conger v. Conger, 77 N. Y. 432; Hill v. Hill, 2 Swab. & T. 515; Nicholson v. Nicholson, 3 Swab. & T. 214; Amory v. Amory, 6 Rob. N. Y. 514; Mercer v. Mercer, 1 MacAr. 655; Lee v. Lee, Law Rep. 2 P. & M. 409; Fitzgerald v. Fitzgerald, 3 Swab. & T. 400; Godrich v. Godrich, Law Rep. 2 P. & M. 392; Ahier v. Ahier, 10 P. D. 110; Taplin v. Taplin, 13 P. D. 100; Tierney v. Tierney, 1 Wash. 568.

<sup>6</sup> Poertner v. Poertner, 66 Wis. 644;

§ 679. **Weight of Evidence.**—The common objection that the verdict is contrary to the weight of evidence<sup>1</sup> is available in these cases. But, as in others, it is not sufficient simply that the judge would have found differently; he must, said Cresswell, J., be “dissatisfied, the word used by Lord Mansfield, which means something more than that he entertained a different opinion.”<sup>2</sup> It is not, therefore, enough that the evidence is conflicting,<sup>3</sup> or otherwise the conclusion of the jury was in the opinion of the judge wrong.<sup>4</sup> Yet,—

§ 680. **Equity Verdict.**—Where the proceeding is in equity, and the verdict is on a feigned issue and only advisory,<sup>5</sup> the case is different; then the court will not divorce one whom it does not believe to be guilty. As observed in a New York case, the object of sending an issue to a jury is the protection of the defendant, who would not be protected if a divorce should be granted contrary to what the judge deemed to be the justice of the case.<sup>6</sup> Again,—

§ 681. **Evidence rejected.**—As in other causes, though the improper rejection of evidence is ground for a new trial, it will not be granted where its admission would not have changed the result.<sup>7</sup>

§ 682. **The Mistake of a Witness,**—which afterward he discovers and desires to correct, may justify a new trial for the purpose.

§ 683. **Contrary to Allegations.**—A verdict for a party contrary to his allegations cannot stand.<sup>9</sup>

§ 684. **Own Conduct.**—One whose own improper conduct in the cause has procured a verdict against himself, cannot have it, therefore, set aside; he has no just ground to complain.<sup>10</sup>

*Ferguson v. Ferguson*, 3 Sandf. 307. And see *Bacon v. Bacon*, 2 Swab. & T. 53; *Kolb's Case*, 4 Watts, 154.

<sup>1</sup> *Ulrich v. Ulrich*, 8 Kan. 402.

<sup>2</sup> *Miller v. Miller*, 2 Swab. & T. 427, 431. See also for decisions in this court, *Hill v. Hill*, 2 Swab. & T. 407; *Stoate v. Stoate*, 2 Swab. & T. 384; *Dolby v. Dolby*, 2 Swab. & T. 228, 229.

<sup>3</sup> *Gibbs v. Gibbs*, 18 Kan. 419; *Matthai v. Matthai*, 49 Cal. 90.

<sup>4</sup> *Hills v. Hills*, 76 Me. 486.

<sup>5</sup> *Ante*, § 675.

<sup>6</sup> *Ferguson v. Ferguson*, 1 Barb. Ch. 604; s. p. in substance, in *Moore v. Moore*,

22 Tex. 237. See *Forrest v. Forrest*, 25 N. Y. 501; *Mulock v. Mulock*, 1 Edw. Ch. 14; *Richmond v. Richmond*, 10 Yerg. 343; *O'Bryan v. O'Bryan*, 13 Mo. 16, 53 Am. D. 128; *Vance v. Vance*, 17 Me. 203.

<sup>7</sup> *French v. French*, 14 Gray, 186. See also *Pinkard v. Pinkard*, 14 Tex. 356, 65 Am. D. 129.

<sup>8</sup> *Jago v. Jago*, 3 Swab. & T. 103.

<sup>9</sup> *Wood v. Wood*, 5 Ire. 674; *Haltenhof v. Haltenhof*, 25 Ill. Ap. 236. And see *Stokes v. Stokes*, 1 Misso. 320; *Cass v. Cass*, 34 La. An. 611.

<sup>10</sup> *Nutting v. Herbert*, 37 N. H. 346, 354. And see *Folsom v. Folsom*, 55 N. H. 78.

§ 685. *Appeals to the Higher Court and Rehearings there:—*

**Application for New Trial.**—Where the application to set aside a verdict as contrary to the weight of conflicting evidence is made in the higher court, it will rarely yet sometimes prevail as against the opinion of the trial judge, who saw the witnesses and heard them testify.<sup>1</sup> In other respects, —

§ 686. **Higher Court reviewing Cause.**—There are questions connected with the practice of taking a case, after verdict, before the full bench of judges or the higher court for review. But they are local in their nature, and a simple reference to some of the authorities will suffice.<sup>2</sup>

VII. *Death and Discontinuances.*

§ 687. **Death.**—As general doctrine, the death of one of the parties abates the suit past revival.<sup>3</sup> But by force of statutes in

<sup>1</sup> *Stevenson v. Stevenson*, 29 Mo. 95; *Callahan v. Callahan*, 7 Neb. 38; *Henderson v. Henderson*, 110 Ind. 316; *Miller v. Miller*, 14 Mo. Ap. 418. And see *Street v. Street*, 2 Add. Ec. 1, 2 Eng. Ec. 195; *Corrie v. Corrie*, 46 Mich. 235.

<sup>2</sup> *Hoffman v. Hoffman*, 30 Pa. 417; *Holloman v. Holloman*, 2 Dev. & Bat. Eq. 270; *Hunt v. Yeatman*, 3 Ohio, 15, 16; *Hofmire v. Hofmire*, 7 Paige, 60, 32 Am. D. 611; *Goodin v. Smith*, Milward, 236; *Frankfort v. Frankfort*, 3 Curt. Ec. 715, 7 Eng. Ec. 558; *Street v. Street*, 2 Add. Ec. 1, 2 Eng. Ec. 195; *Bogges v. Bogges*, 4 Dana, 307; *Dunn v. Dunn*, 4 Paige, 425; *Smith v. Smith*, 4 Paige, 432, 27 Am. D. 75; *Phelps v. Phelps*, 7 Paige, 150; *Burr v. Burr*, 10 Paige, 166; *Jeans v. Jeans*, 3 Harring. Del. 136; *Sheafe v. Sheafe*, 9 Fost. N. H. 269; *Jungk v. Jungk*, 5 Iowa, 541; *Thornberry v. Thornberry*, 4 Litt. 251; *Maguire v. Maguire*, 7 Dana, 181; *Evans v. Evans*, 5 B. Monr. 278; *Pence v. Pence*, 6 B. Monr. 496; *Bourne v. Simpson*, 9 B. Monr. 454; *Hanberry v. Hanberry*, 29 Ala. 719; *Meyar v. Meyar*, 3 Met. Ky. 298; *Malony v. Malony*, 9 Rob. La. 116; *Smith v. Smith*, 20 Mo. 166; *Miller v. Miller*, 3 Binn. 30; *Andrews v. Andrews*, 5 S. & R. 374; *Price v. Price*, 10 Ohio St. 316; *Robbarts v. Robbarts*, 9 S. & R. 191; *Brentlinger v. Brentlinger*, 4 Rawle, 241; *Brom v. Brom*, 2

*Whart.* 94; *Bascom v. Bascom*, 7 Ohio, 2d pt. 125; *Tappan v. Tappan*, 6 Ohio St. 64; *Sherwood v. Sherwood*, 44 Iowa, 192; *Jones v. Jones*, 18 Me. 308, 36 Am. D. 723; *Hansford v. Hansford*, 10 Ala. 561; *Pittman v. Pittman*, 3 Or. 472; *Thomas v. Thomas*, 64 Mo. 353; *Cox v. Cox*, 19 Ohio St. 502, 2 Am. R. 415; *Underwood v. Underwood*, 12 Fla. 434; *Robinson v. Robinson*, 2 P. D. 77; *Krone v. Linville*, 31 Md. 138; *Simpson v. Simpson*, 25 Ark. 487; *Slade v. Slade*, 58 Me. 157; *Stephens v. Stephens*, 51 Ind. 542; *Garner v. Garner*, 38 Ind. 139; *Hardy v. Kirtland*, 34 Ind. 365; *Bostwick v. Bostwick*, 73 Tex. 182; *Ingalls v. Ingalls*, 150 Mass. 57; *Thompson v. Thompson*, 79 Me. 286; *Ensler v. Ensler*, 72 Iowa, 159; *Sharon v. Sharon*, 67 Cal. 185; *Galusha v. Galusha*, 108 N. Y. 114; *Golding v. Golding*, 74 Mo. 123; *Lochnane v. Lochnane*, 78 Ky. 467; *Holthoefer v. Holthoefer*, 47 Mich. 643; *Brown v. Brown*, 60 Cal. 579; *Reilly v. Reilly*, 60 Cal. 624; *Brotherton v. Brotherton*, 12 Neb. 72.

<sup>3</sup> *Swan v. Harrison*, 2 Coldw. 534; *Grant v. Grant*, 2 Swab. & T. 522; *Brocas v. Brocas*, 2 Swab. & T. 383; *Fornshill v. Murray*, 1 Bland, 479; *Barney v. Barney*, 14 Iowa, 189; *Pearson v. Darrington*, 32 Ala. 227; *Downer v. Howard*, 44 Wis. 82; *Zoellner v. Zoellner*, 46 Mich. 511; *Downer v. Howard*, 44 Wis. 82; *Sackett v. Giles*,

some of our States, there may be partial resurrections of the proceedings as to their effect on property rights.<sup>1</sup> And there may be a *nunc pro tunc* judgment when the case falls within the principles on which such judgments are allowed in other suits.<sup>2</sup>

§ 688. **Discontinuances** — and dismissals may transpire. But they do not require special explanation.<sup>3</sup>

### § 689. *The Doctrine of this Chapter restated.*

In many respects, a divorce suit is without peculiarities, and it follows the practice of the same court in other causes. But always the fact that the public is a silent party, whose rights must be protected, is present, yet not always does this fact vary the result. In this chapter, we have illustrations of these several propositions, yet their repetition is unnecessary.

3 Barb. Ch. 204; Kimball v. Kimball, 44 N. H. 122, 82 Am. D. 194; Pingree v. Goodrich, 41 Vt. 47; McCurley v. McCurley, 60 Md. 185, 45 Am. R. 717. "It would be a singular thing if, after the marriage has been dissolved by death, there were power to declare it at an end on another ground." Cotton, L. J. in Stanhope v. Stanhope, 11 P. D. 103, 105.

<sup>1</sup> Shafer v. Shafer, 30 Mich. 163; Wren v. Moss, 2 Gilman, 72; Hawks v. Hawks, 1 P. D. 137; Ewald v. Corbett, 32 Cal. 493. And see Downer v. Howard, *supra*;

Francis v. Francis, 31 Grat. 283; Israel v. Arthur, 6 Colo. 85.

<sup>2</sup> Mead v. Mead, 1 Mo. Ap. 247, 254; Webber v. Webber, 83 N. C. 280.

<sup>3</sup> Dixon v. Dixon, Law Rep. 2 P. & M. 253; Murphy v. Murphy, 8 Philad. 357; Burgess v. Burgess, 1 Duv. 287; Cooper v. Cooper, 3 Swab. & T. 392; Campbell v. Campbell, 12 Hun, 636, 54 How. Pr. 115; Clark v. Clark, 29 Ill. Ap. 257; Reynolds v. Reynolds, 67 Cal. 176; Ashmead v. Ashmead, 23 Kan. 262.

## CHAPTER XXI.

## THE CONSENTINGS OF THE PARTIES, THEIR BARGAININGS, AND THEIR CONFESSIONS.

- § 690. Introduction.  
 691-706. Consentings and Bargainings.  
 707-729. Confessions in Evidence.  
 730. Doctrine of Chapter restated.

§ 690. **How Chapter divided.**—We shall consider, I. Consentings and Bargainings of the Parties; II. Confessions in Evidence.

I. *Consentings and Bargainings of the Parties.*

§ 691. **Doctrine defined.**—The consent or agreement of married parties is no ground for divorce.<sup>1</sup> And it is contrary to the policy of the law to permit divorce except for causes and in a manner which itself has defined and approved. Therefore an agreement between husband and wife,<sup>2</sup> or a consent from either of them, whether direct or indirect, can have no effect toward dissolving or suspending the marriage, and being contrary to law, it vitiates every other bargaining of which it forms an inseparable<sup>3</sup> part.<sup>4</sup> Thus,—

§ 692. **Default — Pro Confesso.**—A default in a divorce suit,<sup>5</sup> or taking the bill *pro confesso* when the proceeding is in equity,<sup>6</sup> does not, as in other causes, authorize a judgment without proofs,

<sup>1</sup> Vol. I. § 55.

<sup>2</sup> Vol. I. § 1261, 1268, 1270, 1274, 1275.

<sup>3</sup> Bishop Con. § 487.

<sup>4</sup> Vol. I. § 73, 76.

<sup>5</sup> *Palmer v. Palmer*, 1 Paige, 276; *Van Veghten v. Van Veghten*, 4 Johns. Ch. 501; *Williamson v. Williamson*, 1 Johns. Ch. 488; *Graves v. Graves*, 2 Paige, 62; *Barry v. Barry*, Hopkins, 118; *Mansfield v. Mansfield*, Wright, 284; *Smith v. Smith*,

Wright, 643; *Hanks v. Hanks*, 3 Edw. Ch. 469; *Robinson v. Robinson*, 1 Barb. 27; *Welch v. Welch*, 16 Ark. 527; *Scott v. Scott*, 17 Ind. 309; *Robinson v. Robinson*, 16 Mich. 79.

<sup>6</sup> *Hanks v. Hanks*, 3 Edw. Ch. 469; *Kilborn v. Field*, 78 Pa. 194; *Latham v. Latham*, 30 Grat. 307; *Graves v. Graves*, 2 Paige, 62; *Robinson v. Robinson*, 1 Barb. 27; *Hawes v. Hawes*, 33 Ill. 286.



or in any degree supersede the necessity of proofs, or lighten the burden of the plaintiff in establishing his allegations. To broaden these explanations,—

§ 693. **The Wife's Incapacity from Coverture**,—as recognized in the other departments of our law, has little if any influence on the questions we are here considering. For,—

§ 694. **Her Power over Divorce Suit**.—Since every provision of law carries with it so much of collateral right and remedy as will make it effectual,<sup>1</sup> a wife authorized to bring or defend a divorce suit in her own name<sup>2</sup> may, by reason of such authority, act in all respects relating thereto as though not under coverture. And her agreements, when fair and fairly made, and not contrary to the policy of the law, will be enforced against her.<sup>3</sup> For example, she may settle the suit,<sup>4</sup> even in opposition to her solicitor, who has not received his fees. But the court will look into all such arrangements to see that she has not been overreached or imposed upon by her husband.<sup>5</sup> And she may release her right of divorce for an offence which her husband has committed,<sup>6</sup> — the common case of condonation.<sup>7</sup> Again,—

§ 695. **Her Power otherwise of Contract**.—It is not so widely a rule of the unwritten law as it is sometimes assumed to be, that a wife cannot bind herself by contract. As to most things, she may enter into agreements enforceable in equity if not at law.<sup>8</sup> And in the ecclesiastical courts, from which we received our divorce law, incapacity from coverture is even less regarded than in equity. Beyond which, modern statutes have largely augmented the wife's power of contract. Now,—

§ 696. **Bargainings about Divorce**.—Assuming, as it thus appears we may, that husband and wife are on the present ground equal, with no impediment from the coverture, it follows that

<sup>1</sup> Ante, § 116 and note.

<sup>2</sup> Ante, § 501, 507, 509, 513, 514.

<sup>3</sup> Ante, § 55, note 1; *Hooper v. Hooper*,

3 Swab. & T. 251; *Stanes v. Stanes*, 3 P. D. 42, 44. See *Van Order v. Van Order*, 8 Hun, 315; *Stilson v. Stilson*, 46 Conn. 15. And for various principles bearing upon this proposition, 1 Bishop Mar. Women, § 35-38, 707-734. And see *Rowley v. Rowley*, Law Rep. 1 H. L. Sc. 63.

<sup>4</sup> *Wilson v. Wilson*, 14 Sim. 405, 1

H. L. Cas. 538; *McCarthy v. McCarthy*, 36 Conn. 177.

<sup>5</sup> *Kirby v. Kirby*, 1 Paige, 565. And see Anonymous, 5 How. Pr. 306. An agreement by counsel to compromise was not recognized in *Hayward v. Hayward*, 1 Swab. & T. 333.

<sup>6</sup> *Rowley v. Rowley*, Law Rep. 1 H. L. Sc. 63, 3 Swab. & T. 338, 4 Swab. & T. 137; *Gipps v. Gipps*, 3 Swab. & T. 116.

<sup>7</sup> Ante, § 269, 284, 286.

<sup>8</sup> 1 Bishop Mar. Women, § 718-720.

there are bargainings concerning divorce which they may make with effect, and others which they cannot. Marriageable unmarried persons may bind themselves by promises to marry, and the married who are in separation may validly agree to renew cohabitation. For the law favors marriage.<sup>1</sup> But the law does not favor divorce, and permits it only for approved causes, and on sentence from duly established public authority. Therefore any agreement for divorce, or any collateral bargaining promotive of it, is unlawful and void.<sup>2</sup> On the other hand, the parties may freely contract with each other and with third persons in any way or for any purpose not antagonistic to the law or its policy as thus explained. There are within this distinction questions open to doubts and differences of opinion, others are reasonably certain. Thus,—

§ 697. **Deceiving Court.**—Any agreement between the parties to withhold facts or evidence from the court, or to influence its decision by concealment or misrepresentation, is, as collusion,<sup>3</sup> void.<sup>4</sup> The only difficulty about this doctrine is in its application. To illustrate,—

§ 698. **Instances.**—If a wife claims that her husband has furnished her a particular ground for divorce, a bargaining with him whereby she is to abandon this cause and have a divorce for another which does not exist,<sup>5</sup> he to aid in procuring it, is unlawful and nugatory. “It may be,” said Berkshire, J., “that if an action for divorce is pending, or if in anticipation of such an action the parties meet and agree upon the amount of alimony to be allowed to the wife in case a divorce is granted,<sup>6</sup> and the arrangement is just and equitable, and confined strictly to the matter of alimony, it will be sustained. But if the agreement is broader in its terms, and its tendency is to interest the husband in procuring a divorce or in foregoing resistance to an effort by his wife to that end, then it is contrary to public policy

<sup>1</sup> Vol. I. § 76, 183, 1281.

<sup>2</sup> Vol. I. § 73, 76, 1261; ante, § 691.

<sup>3</sup> Ante, § 252, 253.

<sup>4</sup> *Speck v. Dausman*, 7 Mo. Ap. 165; *Moon v. Baum*, 58 Ind. 194; *Sellon v. Reed*, 5 Bis. 125; *Adams v. Adams*, 25 Minn. 72; *Kilborn v. Field*, 78 Pa. 194; *Comstock v. Adams*, 23 Kan. 513, 33 Am. R. 191; *Stilson v. Stilson*, 46 Conn. 15;

*Belden v. Munger*, 5 Minn. 211, 80 Am. D. 407; *Sterling v. Sterling*, 12 Ga. 201; *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *Douville v. Merrick*, 25 Wis. 688; *Dutton v. Dutton*, 30 Ind. 452; *Muckenburt v. Holler*, 29 Ind. 139.

<sup>5</sup> Ante, § 252.

<sup>6</sup> Post, § 702.

and is void.”<sup>1</sup> And it is the same where the bargaining between the parties is to suppress a part of the evidence, and take the judgment to which the other part entitles them.<sup>2</sup> So a wife’s undertaking to accept five hundred dollars in full for all her claims as wife or widow in her husband’s property, coupled with her promise not to resist his divorce suit should he bring one, to put him to no additional costs, and to make no claim for alimony, was held to be a mere nugatory attempt to defraud the court in which afterward he should bring his suit.<sup>3</sup> Still,—

• § 699. **Facilitating Justice — Furnishing Evidence.** — As explained in a preceding chapter,<sup>4</sup> a mere smoothing of the asperities of a just litigation is not legally wrong, and it may be morally commendable. In Connecticut, after a husband had committed adultery and contracted venereal disease, he and the wife covenanted through a trustee that they would dissolve as far as they could the obligations of the marriage; that he would provide for her a separate maintenance, and she should be no further chargeable to him; and that, seeing he had offended, he would furnish money and testimony to procure a divorce, she instituting the necessary proceedings, to be under his direction. And the majority of the Supreme Court of Errors held this agreement to be fraudulent and void as tending to mislead the court and interfere with the administration of justice. All were of opinion that had it been to procure false testimony, or impose upon the court, it would have been void. But the dissenting judges contended that no fraud appeared in the facts; that, it being the duty of the husband to furnish his wife, who had no money, with the means to procure a divorce, and afterward to pay alimony, there was no fraud in his promising what he was under a legal duty to perform; and that, the object of placing the control of the divorce suit in his hands having been merely to prevent the fact of his having had venereal disease becoming public, there was no imposition upon the tribunal in the omission of an incident which could not influence the result, the other proofs being ample. It was not denied that a suit for divorce got up solely by the defendant, under his own control and for his own benefit, would on this fact appearing be dismissed.<sup>5</sup> Again,—

<sup>1</sup> *Stokes v. Anderson*, 118 Ind. 533, 552.

<sup>4</sup> *Ante*, § 253, 254.

<sup>2</sup> *Butler v. Butler*, 15 P. D. 13, 32, 66.

<sup>5</sup> *Goodwin v. Goodwin*, 4 Day, 343.

<sup>3</sup> *Thompson v. Thompson*, 70 Mich. 62. And see *Douville v. Merrick*, 25 Wis. 688.

§ 700. **Not to defend.**—No harm will come to the plaintiff or the public simply from the defendant's not choosing to make and not making a defence.<sup>1</sup> But a bargaining that there shall be none is not permissible. And no promise founded on such an undertaking can be enforced.<sup>2</sup> Even an agreement between a husband and the overseers of the poor of a town by which his wife is supported as a pauper, that the town will not oppose his divorce proceeding, has been adjudged void as against public policy. Sawyer, J., likened this case to one theretofore decided "of a promissory note,"<sup>3</sup> given in consideration of the libellee's forbearing to claim alimony out of the estate of the libellant, when the ground for claiming it was such as would constitute a defence to the libel. . . . This was a fraud upon the law, the policy of which was to guard and uphold the marriage relation with a watchful vigilance."<sup>4</sup>

§ 701. **Not to bring Nullity Suit.**—**Divorce Suit.**—There is an Irish case wherein persons in interest had agreed not to institute a suit to avoid a voidable marriage. After this agreement had been acted on twenty years, and one of the married parties had died,<sup>5</sup> the Chancellor refused to set it aside. And he deemed that the agreement was not inconsistent with the policy of the law, or the principles of a court of equity.<sup>6</sup> While this decision itself is clearly right, and while the Chancellor's view of the policy of the law is just in its application to some voidable marriages, we may doubt whether the agreement would not be deemed unlawful in respect of others. But plainly, as the law favors marriage and cohabitation thereunder,<sup>7</sup> parties may validly bargain to bring no divorce suit, or to discontinue a pending one.<sup>8</sup>

§ 702. **Bargainings about Property Interests.**—It is not *per se* a violation of the law's policy, therefore is not necessarily nugatory, for the parties to a divorce suit to enter into an agreement as to what alimony<sup>9</sup> shall be allowed, how their property shall be di-

<sup>1</sup> Ante, § 253.

<sup>2</sup> Kilborn v. Field, 78 Pa. 194; Stoutenburg v. Lybrand, 13 Ohio St. 228; Bel-den v. Munger, 5 Minn. 211, 80 Am. D. 407; Viser v. Bertrand, 14 Ark. 267.

<sup>3</sup> Sayles v. Sayles, 1 Fost. N. H. 312, 53 Am. D. 208.

<sup>4</sup> Weeks v. Hill, 38 N. H. 199, 204.

<sup>5</sup> That such a marriage cannot be set aside after the death of a party to it, see Vol. I. § 259, 265, 266.

<sup>6</sup> Westby v. Westby, 1 Connor & Law-son, 537, 2 Drury & Warren, 502, 4 Ir. Eq. 585.

<sup>7</sup> Ante, § 696.

<sup>8</sup> Ante, § 694; Sterling v. Sterling, 12 Ga. 201. See also Ratcliff v. Ratcliff, 1 Swab. & T. 467; Lloyd v. Lloyd, 1 Swab. & T. 567.

<sup>9</sup> Ante, § 698.

vided, and the like, on the rendition of a decree for dissolution or separation. But if the contract is of a sort to stimulate the divorce, to discourage any defence, or in any way to impose upon the court, it will be void; for example, it will be void if so framed as to have effect only on condition that a divorce is granted without alimony.<sup>1</sup> Hence practically, and almost and sometimes quite as matter of law, an agreement of this sort should be laid before the judge, when, to an extent not readily definable, it will be ill if he dissents, and good if he approves.<sup>2</sup> More of this matter will appear when, in subsequent connections, we consider the subjects of alimony, of the division of the property of the parties, and the like.

§ 703. **Party and Public distinguished.** — Recurring to the doctrine that the public is in these suits a silent party to the extent that its interests will be protected, a party of record may bind himself in most things, but he is without power to bind also the public.<sup>3</sup> Thus,—

§ 704. **Default — (Alimony — Costs — Interrogating Witnesses).** — A default, if the court does not take it off, is conclusive against the defendant. He cannot have costs, though in the public interest the complaint against him is dismissed. Nor can a defaulted wife have alimony *pendente lite*. Yet it was held that after a bill in equity was taken against her for confessed, and referred to a master for proofs, she might appear before him and cross-examine the husband's witnesses and produce witnesses of her own, at her own expense, not otherwise.<sup>4</sup> The principle is that the court in satisfying its conscience and protecting the public will receive light from any source, only not to the undue burdening of itself or the party. So,—

§ 705. **Admissions in Pleadings.** — A party is bound by admissions in his pleadings, and held to the truth of all his allegations, the same in these suits as in others. But the public is not concluded by them; so that the court may and often does inquire what are the real facts behind the pleadings.<sup>5</sup> But—

<sup>1</sup> Speck *v.* Dausman, 7 Mo. Ap. 165.

<sup>2</sup> Ante, § 694; Owen *v.* Yale, 75 Mich. 256; Hamilton *v.* Hamilton, 89 Ill. 349; Snow *v.* Gould, 74 Me. 540, 43 Am. R. 604; Martin *v.* Martin, 65 Iowa, 255; Seeley's Appeal, 56 Conn. 202; Jordan *v.* Westerman, 62 Mich. 170, 4 Am. St. 836; Chapin *v.* Chapin, 135 Mass. 393;

Senter *v.* Senter, 70 Cal. 619; Moon *v.* Baum, 58 Ind. 194; Packard *v.* Packard, 34 Kan. 53; Gray *v.* Gray, 83 Mo. 106. And see Born *v.* Horstmann, 80 Cal. 452.

<sup>3</sup> Ante, § 662–664.

<sup>4</sup> Perry *v.* Perry, 2 Barb. Ch. 285. And see Graves *v.* Graves, 2 Paige, 62.

<sup>5</sup> Suggate *v.* Suggate, 1 Swab. & T.

§ 706. **Not affecting Public — Preliminaries in Suit.** — The public has no interest in any steps in a divorce cause which do not concern the merits, therefore the right to take an objection may be barred by a pleading.<sup>1</sup> Of this sort are the various preliminaries to the hearing, — service of process, waiver of service by appearance and otherwise, amendments,<sup>2</sup> and other like things. These may be governed by the same judicial rules which subserve justice in other causes. A contrary view appears in one case,<sup>3</sup> but it is not probable this precedent will be followed.

## II. *Confessions in Evidence.*

§ 707. **Doctrine defined.** — The last sub-title explains that there can be no divorce on default, or on the confessions of the parties in court. And the doctrine of this one is that for the reasons there stated no decree or sentence of dissolution, separation, or nullity can be founded on the sole evidence of the confessions of the defendant out of court. Historically, —

§ 708. **The Ancient Common Law,** — in harmony wherewith is the modern, was so. For when parties who had lived together in wedlock sixteen years were collusively proceeding in the Spiritual Court, on the false allegation of incest, to dissolve their marriage and bastardize their children, — “they both appear and confess the matter, upon which a sentence of divorce was to pass,” — the Court of King’s Bench pronounced this threatened decree unlawful, and a subject for prohibition.<sup>4</sup>

§ 709. **The Canon Law** — is the same. It in early times rested on a decretal epistle of Pope Celestine III., renewed by the canons of 1597. “And how great need,” says Gibson, “there was of such a prohibition will appear to any one who shall consult the ancient acts of [the ecclesiastical] courts before those times, and see there how common it was to pronounce separations

492; *Prescott v. Fisher*, 22 Ill. 390; *Wagner v. Wagner*, 6 Mo. Ap. 573; *Warner v. Warner*, 4 Stew. Ch. 225; *Schmidt v. Schmidt*, 2 Stew. Ch. 496; *Latham v. Latham*, 30 Grat. 307.

<sup>1</sup> *Johnson v. Johnson*, 12 Bush, 485; *Forster v. Forster*, 3 Swab. & T. 144. And see *Bostwick v. Perkins*, 4 Ga. 47; *Georgia Rld. &c. Co. v. Harris*, 5 Ga. 527.

<sup>2</sup> *Hackney v. Hackney*, 9 Humph. 450;

*Anderson v. Anderson*, 4 Greenl. 100, 16 Am. D. 237; *Fishli v. Fishli*, 2 Litt. 337; *Tourtlot v. Tourtlot*, 4 Mass. 506.

<sup>3</sup> *Smith v. Smith*, Wright, 643. See as adverse to this, *Feigley v. Feigley*, 7 Md. 537, 61 Am. D. 375. See also *Spafford v. Spafford*, 16 Vt. 511.

<sup>4</sup> *Collet’s Case*, 2 Mod. 314, T. Jones, 213.

upon the sole confessions of the parties, and how numerous the separations were, so long as that continued to be the rule.”<sup>1</sup> Later,—

§ 710. **Canon of 1603 — Common Law.**—The 105th Canon of 1603, binding the ecclesiastical courts yet not by a force of its own controlling the other tribunals,<sup>2</sup> confirmed ecclesiastically what was from the beginning the common-law doctrine;<sup>3</sup> thus, “Forasmuch as matrimonial causes have been always reckoned and reputed among the weightiest, and therefore require the greater caution when they come to be handled and debated in judgment, especially in causes wherein matrimony, having been in the church duly solemnized, is required upon any suggestion or pretext whatsoever to be dissolved or annulled, we do strictly charge and enjoin that in all proceedings in divorce<sup>4</sup> and nullities of matrimony, good circumspection and advice be used, and that the truth may as far as is possible be sifted out by the depositions of witnesses and other lawful proofs and evictions, and that credit be not given to the sole confession of the parties themselves, howsoever taken upon oath, either within or without the court.”<sup>5</sup>

§ 711. **With us,**—this canon, embodying the law of both the spiritual and temporal tribunals of England as administered when we derived thence our unwritten law, is in spirit and effect, probably in letter also, common law. Our courts have uniformly proceeded upon its principles.<sup>6</sup> And some of the States have incorporated the substance of it into statutes; and one or more of them, as we shall see further on,<sup>7</sup> have provided a rule more rigid. Looking now for the interpretations of our unwritten rule,—

<sup>1</sup> Gibs. Cod. 445; Cobbe v. Garston, Milward, 529, 537.

<sup>2</sup> Vol. I. § 103.

<sup>3</sup> Ante, § 708.

<sup>4</sup> This applies as well to separations *a mensa* as to divorces *a vinculo*. Noverre v. Noverre, 1 Rob. Ec. 428, 436; Savoie v. Ignogoso, 7 La. 281; Sawyer v. Sawyer, Walk. Mich. 48. And see observations of Lord Stowell, in Mortimer v. Mortimer, 2 Hag. Con. 310, 316, 4 Eng. Ec. 543, 546.

<sup>5</sup> Poynter Mar. & Div. 338; Gibs. Cod. 445. Collet's Case, 2 Mod. 314, T. Jones, 213, was about the year 1670; so that what the spiritual courts are represented in it as proposing was as much against their own law as the common law.

<sup>6</sup> Gould v. Gould, 2 Aikens, 180; Washburn v. Washburn, 5 N. H. 195; Baxter v. Baxter, 1 Mass. 346; Betts v. Betts, 1 Johns. Ch. 197; Montgomery v. Montgomery, 3 Barb. Ch. 132; Devanbagh v. Devanbagh, 5 Paige, 554, 28 Am. D. 443; Holland v. Holland, 2 Mass. 154; Clutch v. Clutch, Saxton, 474; Scott v. Scott, 17 Ind. 309; True v. True, 6 Minn. 458; White v. White, 45 N. H. 121; Wood v. Wood, 2 Brews. 447; Craig v. Craig, 31 Tex. 203; Woolfolk v. Woolfolk, 53 Ga. 661; Lyon v. Lyon, 62 Barb. 138; Succession of Weigel, 18 La. An. 49; Le Brun v. Le Brun, 55 Md. 496.

<sup>7</sup> Post, § 728.

§ 712. **Admissible.** — Neither the language of the rule nor its reason renders inadmissible the evidence of a confession, since the object at which both aim is the truth. Therefore in divorce causes, the same as in the other departments of our law of evidence, the party's confessions are admissible against him.<sup>1</sup> But —

§ 713. **Not alone Adequate.** — If confessions were alone sufficient, the marriage would be placed at the will of the parties, in frustration of the entire policy of the law.<sup>2</sup> And as Dr. Lushington once observed, "no tribunal is to be trusted with the power to determine that which is impossible; namely, whether such a confession be genuine or false. Still, it is evidence of the highest character; and I well recollect, in the case of *Mortimer v. Mortimer*,<sup>3</sup> it was strongly relied on by Lord Stowell." Therefore while the confession is admissible, there must be evidence auxiliary thereto.<sup>4</sup> A question may arise as to how far, to be admissible, it must be —

§ 714. **Voluntary.** — There is a familiar rule of criminal evidence that the court will not receive a confession if made under such pressure of hope or fear, or under such duress, as renders it, in the language of the law, not voluntary.<sup>5</sup> And the reason is that though such a confession may be true, its liability to be otherwise is so great as to constitute its exclusion the safer practice. Hope and fear created by official pressure and promises are not in divorce cases, as in criminal ones, ordinary factors. And thus far, therefore, our divorce jurisprudence has not disclosed any rule on this exact question. But a confession forced from one by duress would appear to be in authority, as pretty

<sup>1</sup> Cases cited to the last section and the next; *Richardson v. Richardson*, 50 Vt. 119; *Lindsay v. Lindsay*, 15 Stew. Ch. 150.

<sup>2</sup> *Holland v. Holland*, 2 Mass. 154.

<sup>3</sup> *Mortimer v. Mortimer*, 2 Hag. Con. 310, 4 Eng. Ec. 543.

<sup>4</sup> *Noverre v. Noverre*, 1 Rob. Ec. 428, 440; *Armstrong v. Armstrong*, 32 Missis. 279, 288; *Mack v. Handy*, 39 La. An. 491. In a Pennsylvania case, Gibson, C. J. said: "It is a rule of policy not to found a sentence of divorce on confession alone. Yet where it is full, confidential, relevant, free from suspicion of collusion, and corroborated by circumstances, it is ranked with the safest proofs." *Matchin v. Matchin*, 6 Pa. 332, 337, 47 Am. D. 466. "A species

of evidence of the highest kind, provided always that it is accompanied with certain requisites, — first, undoubted proof that the admissions were made; second, that the expressions were clear and distinct; and, third, that the admissions were sincere." Dr. Lushington, in *Stone v. Stone*, 3 Notes Cas. 278, 286; *Betts v. Betts*, 1 Johns. Ch. 197; *Williams v. Williams*, 1 Hag. Con. 299, 4 Eng. Ec. 415, 417. See also Lord Brougham, in *Creagh's Divorce Bill*, 32 Leg. Obs. 91; *Harris v. Harris*, 2 Hag. Ec. 376, 409, 4 Eng. Ec. 160, 175. But see *Hansley v. Hansley*, 10 Ire. 506.

<sup>5</sup> 1 Bishop Crim. Proc. 3d ed. § 1223-1227, 1235, 1237, 1238.



clearly it is in reason, inadmissible in a divorce case. Thus, a New York court once held that if a husband by fraud and duress obtains from his wife a written confession of adultery, then commences a divorce suit for it, equity will enjoin him from using the confession in the suit.<sup>1</sup> In New Jersey, a confession of adultery procured unfairly, and made without a full understanding of its force and effect, was regarded as of no weight, though in writing and sworn to before an officer qualified to administer oaths.<sup>2</sup> And in another New Jersey case, a confession of adultery written by the wife in the presence and under the eye of her husband was presumed to proceed from his coercion, therefore to be an unsafe ground on which to rest a divorce for this alleged offence.<sup>3</sup> Whether the unsafe confession should be absolutely excluded, or received and given no weight, may be a nice technical question, but the analogies of our law of evidence would require its exclusion. The books suggest some —

§ 715. **Cautions in considering Confession.** — A court should look carefully to see that what is testified to does really amount to a confession.<sup>4</sup> Then, —

§ 716. **Differing Weight.** — The weight to be given a confession will greatly vary with the cases. When properly connected with other facts, it may be entitled to the very highest consideration.<sup>5</sup> And we have just seen that, on the other hand, its weight may be diminished by circumstances, down to the point of exclusion. Thus, —

§ 717. **In a Nullity Suit,** — to declare a marriage had under due formalities void from the beginning, admissions concerning it by the defendant are generally received with particular caution;<sup>6</sup> though, even in this suit, they will sometimes be accorded considerable weight.<sup>7</sup> Dr. Lushington indeed went so far in a case of nullity, where the alleged defect was the undue publication of banns, as to say: "I place very little confidence in these

<sup>1</sup> *Callender v. Callender*, 53 How. Pr. 364.

<sup>2</sup> *Derby v. Derby*, 6 C. E. Green, 36.

<sup>3</sup> *Summerbell v. Summerbell*, 10 Stew. Ch. 603.

<sup>4</sup> *Stone v. Stone*, 3 Notes Cas. 278, 286, 291; *Tucker v. Tucker*, 11 Jur. 893, 5 Notes Cas. 458; *Harris v. Harris*, 2 Hag. Ec. 376, 4 Eng. Ec. 160; *Williams v. Williams*, 1 Hag. Con. 299, 4 Eng. Ec. 415;

*Robinson v. Robinson*, 1 Swab. & T. 362; *Garrett v. Garrett*, 12 Ind. 407.

<sup>5</sup> Ante, § 713 and note; *Jones v. Jones*, 2 C. E. Green, 351, 352.

<sup>6</sup> *Searle v. Price*, 2 Hag. Con. 187, 4 Eng. Ec. 524; *Wright v. Elwood*, 1 Curt. Ec. 662, 666; *Cross v. Cross*, 3 Paige, 139, 23 Am. D. 778.

<sup>7</sup> *Harrison v. Harrison*, 4 Moore, P. C. 96.

subsequent declarations; and I think a grave doubt may be entertained whether such subsequent declarations, in a case of this kind, made long after the marriage, are admissible as evidence; because, in these cases, one party or the other might by admissions affect the status of other parties, by reason that the interests of the parties in the cause are not confined to themselves, but extend to their children and to the public. The declaration of the wife may by possibility be evidence against the husband, or *vice versa*; but where it affects the children, I doubt whether such declarations could be received.”<sup>1</sup>

§ 718. **Reason of Rule — Avoiding Collusion.** — Every rule of law must be interpreted by its reason. And we have seen that the reason of the rule which renders confessions, when unaided by other evidence, inadequate for divorce, is to prevent collusion, or what actually occurred before its adoption; namely, the obtaining of divorces where the justifying derelictions did not exist.<sup>2</sup> As observed in a Scotch court: “The only ground on which the confession of the defender can be excluded in such a case is the danger or element of collusion. But where there is no room for that element . . . no evidence can be stronger, and in England it has been repeatedly admitted in circumstances much less strong” than those then in contemplation.<sup>3</sup> Therefore the evidence accompanying and corroborating the confessions may be either such as, like them, tends directly to prove the issue, or such as simply negatives collusion.<sup>4</sup> Thus, —

§ 719. **Negating Collusion.** — In reason, if it affirmatively appears in evidence that there is no collusion, this established fact gives to the confessions the same status and effect which the like confessions have in the other departments of the law of evidence. In English authority, as it stood in the earlier periods of our American law and anterior to the modern Divorce Act,

<sup>1</sup> Brealy v. Reed, 2 Curt. Ec. 833, 843, 7 Eng. Ec. 328, 330. And see Cobbe v. Garston, Milward, 529, where Dr. Radcliff held that the admissions of the defendant are admissible in a nullity suit, yet are entitled to but little weight. On the other hand, there are cases of this sort wherein they will have a very grave effect. Lindsay v. Lindsay, 15 Stew. Ch. 150.

<sup>2</sup> Ante, § 708; Tucker v. Tucker, 11 Jur. 893, 5 Notes Cas. 458; Owen v. Owen,

4 Hag. Ec. 261; Tewksbury v. Tewksbury, 4 How. Missis. 109; Sawyer v. Sawyer, Walk. Mich. 48, where it was considered that the amount of evidence required to corroborate a confession varies with the danger of collusion; Shelf. Mar. & Div. 412; Burgess v. Burgess, 2 Hag. Con. 223, 4 Eng. Ec. 527.

<sup>3</sup> Fullerton v. Fullerton, 11 Scotch Sess. Cas. 3d ser. 720, 721.

<sup>4</sup> Ante, § 261.

this question appears not to be absolutely settled. But the tendency of the cases is in distinct accord with this doctrine of reason.<sup>1</sup> With us, it is settled that this evidence is adequate; namely, that proof of the absence of collusion will fully supply the special weakness of the confessions, and render them of the same sufficiency in divorce cases as in others. For example,—

§ 720. *Instances.*—In a wife's dissolution suit for the adultery of her husband, who had been absent from her and the State fourteen years, a penitential letter from him to her, asking for a reconciliation, and acknowledging that he had been living with another woman by whom he had five children, was accepted as, under the negative of collusion thus appearing, complete proof.<sup>2</sup> And we have other like adjudications upon similar facts.<sup>3</sup> In

<sup>1</sup> Thus, in *Harrison v. Harrison*, 4 Moore, P. C. 96, 103, the corroborating evidence, which was deemed adequate, showed only the sincerity of the confession and the consequent absence of collusion. It was a nullity suit for the husband's impotence. The examination of the lady (see 3 Curt. Ec. 16, 7 Eng. Ec. 359, where the facts as disclosed before the Consistory Court of London are reported) elicited nothing satisfactory; and the "evidence of Mrs. Dolphin," mentioned in the latter report, is probably what is alluded to in the following passage. In giving in the Court of Privy Council judgment for divorce, confirmatory of the rulings in the Consistory Court and the Court of Arches, Lord Brougham said: "It has been insisted by the counsel for the appellant," the husband, who was the original defendant, "that the confession of non-consummation is not sufficient to satisfy the 105th Canon, and that there must be some extrinsic proof, and for that purpose proof by inspection is said to be essential. Their lordships give no opinion on this construction of the canon; for if adminicular proof is requisite, they think the circumstance of the appellant's having taken a legal opinion of the validity of the marriage, which he admits in his answer, coupled with the confession of non-consummation, and the refusal in the first instance to undergo inspection, is sufficient extrinsic proof; and being satisfied that there is no collusion between the

parties, they affirm the decree of nullity." In *Noverre v. Noverre*, 1 Rob. Ec. 428, the evidence other than the wife's confession went no further than to show extreme, not indecent, familiarities with her alleged paramour, and ample opportunities. In *Tucker v. Tucker*, 11 Jur. 893, no familiarities were proved; but there was the wife's reception of a letter from the alleged paramour, which she had not read, and the contents of which she could not know; together with a meeting, not shown to be criminal, between her and him, after she was turned off by her husband; yet these were held amply sufficient to sustain the confession. See also *Grant v. Grant*, 2 Curt. Ec. 16, 7 Eng. Ec. 3; *Owen v. Owen*, 4 Hag. Ec. 261; *Deane v. Deane*, 12 Jur. 63; *Mortimer v. Mortimer*, 2 Hag. Con. 310, 4 Eng. Ec. 543; *Shuldham's Divorce Bill*, 12 Cl. & F. 363. It has been deemed important to establish the identity of the parties by other evidence than confessions. *Searle v. Price*, 2 Hag. Con. 187.

<sup>2</sup> *Billings v. Billings*, 11 Pick. 461.

<sup>3</sup> *Harman v. McLeland*, 16 La. 26. Yet in *Clutch v. Clutch*, Saxton, 474, it appearing simply that the defendant had told the witness he had venereal disease contracted in New York, and a physician named was attending him, the evidence was very properly adjudged inadequate. But the court less accurately remarked that confessions "are never held sufficient without strong corroborating circumstances." *Hansley v. Hansley*, 10

another case, the testimony disclosed that the alleged *particeps criminis* went late to the house where the defendant wife was residing, her husband being at sea, and remained there about half an hour. The next morning she seemed to be in distress, said this person had been to the house, and she had committed a great sin. When her husband returned, she confessed to him, before witness, that she then committed adultery. The evidence was deemed sufficient.<sup>1</sup> Indeed, the circumstances under which the confession was shown to have been made,<sup>2</sup> likewise the mere fact appearing in the case that the suit was plainly adverse and seriously resisted,<sup>3</sup> have been severally held to so establish such absence of collusion as to justify divorce without other or outside evidence. Further the doctrine cannot go.

§ 721. **Examining Party to Confessions — Negative Issue.** — We are informed that under the ecclesiastical practice in England, the judge privately, and especially in the absence of the husband, interrogated “the woman as to the truth and cause of her confession,” and sought “the truth by all other lawful ways and means.” And if a suspicion of fraud or deceit appeared, “a sentence of divorce will not be granted unless the adultery be otherwise satisfactorily proved.”<sup>4</sup> And the defendant was practically or absolutely required to contest the suit negatively by denying the charge, but he could not be compelled either to give in a plea or to administer interrogatories.<sup>5</sup> Still, whenever a fair case was made out, the relief was granted.<sup>6</sup> On no principle of general law can one be compelled to plead negatively to an allegation which he does not in fact deny. And this peculiarity is explained by Coote, who says that on the admission of the libel “the proctor for the defendant is *bound by the canon* to give a negative issue, in order to prevent the possibility of the parties colluding to deceive the court.”<sup>7</sup> No practice like this seems ever to have prevailed with us.

§ 722. **Confessing for a Purpose.** — If it appears that there was a collateral purpose which the confession was meant to serve, it

Ire. 506, a North Carolina case, goes almost to the extent of holding confessions altogether inadmissible.

<sup>1</sup> *Tewksbury v. Tewksbury*, 2 Dane Abr. 310.

<sup>2</sup> *Tewksbury v. Tewksbury*, *supra*.

<sup>3</sup> *Vance v. Vance*, 8 Greenl. 132. And see *Baker v. Baker*, 13 Cal. 87. But see

*dictum* in *McCulloch v. McCulloch*, 8 Blackf. 60.

<sup>4</sup> Shelf. Mar. & Div. 411; Conset, 280. See Oughton, tit. 213.

<sup>5</sup> See *ante*, § 456.

<sup>6</sup> *Crewe v. Crewe*, 3 Hag. Ec. 123, 131, 5 Eng. Ec. 45, 49.

<sup>7</sup> Coote Ec. Pract. 336.

should have little or no weight. This is a proposition of reason not limited to divorce law. Applying it to divorce, Scott, J., in one case said: "None of the grounds relied on for a divorce are supported by any other evidence than the expressed and implied admissions of the defendant, made at a time and under circumstances which show that as his object was a reconciliation with his wife, he deemed it more advisable to acquiesce in her accusations than to alienate her by a contradiction of them;" therefore, though plainly the confessions did not proceed from collusion, there was for them another motive equally impairing their reliability, and the divorce was refused.<sup>1</sup> And —

§ 723. **Other Circumstances** — of a case may render an apparent confession unsatisfactory and inadequate. It would not be compensatory to anticipate the future, and attempt explanations of what may hereafter arise, but a singular instance from the books may be stated. A husband had found a diary kept by his wife, containing what he not unnaturally deemed to be abundant confessions of adultery. Upon it, with trifling oral support, he had obtained in the Ecclesiastical Court a divorce from bed and board. Proceeding afterward in the Divorce Court for dissolution, and encountering a defence by the alleged paramour, and medical testimony concerning the effect on the mind of certain uterine troubles, he failed. The court, expounding the apparently inculpatory facts of the diary by others, and finding therein evidence of mental extravagancies and almost of hallucinations, though she was not deemed insane, refused to draw the conclusion that she meant to confess adultery.<sup>2</sup>

§ 724. **In Brief**, — while the court should inquire whether the assumed confession was really meant to be such, should weigh it carefully, and should give it little or no effect if there is ground to suspect collusion<sup>3</sup> or if any other like impairing motive or circumstance appears, still when the entire case leaves "in the mind of the court no doubt of the truth of the confessions, it should act accordingly."<sup>4</sup> And the evidence to corroborate them should be greater or less as they are deemed of greater or less weight.<sup>5</sup> A confession in general terms will be applied

<sup>1</sup> *Twyman v. Twyman*, 27 Mo. 383.

299, 4 Eng. Ec. 415; *Burgess v. Burgess*,

<sup>2</sup> *Robinson v. Robinson*, 1 Swab. & T.

2 Hag. Con. 223, 4 Eng. Ec. 527.

362.

<sup>4</sup> *Sawyer v. Sawyer*, Walk. Mich. 48, 52.

<sup>3</sup> *Williams v. Williams*, 1 Hag. Con.

<sup>5</sup> *Clutch v. Clutch*, Saxton, 474; *Jones*

to all times and places when and where the other proofs show that the offence might have been committed.<sup>1</sup> But the special terms may limit it to a part only of the dereliction charged.<sup>2</sup>

§ 725. *Statutes modifying or not:—*

In some of our States—the unwritten law of this subject has been modified by statutes, though in most of them it remains as we receive it from England.<sup>3</sup> To begin with the mother country, and with statutes which do not modify,—

§ 726. **The English Divorce Act**—provides that “the rules of evidence observed in the superior courts of common law at Westminster shall be applicable to and observed in the trial of all questions of fact in the court.”<sup>4</sup> Thereupon we have in one case a judicial intimation that the ecclesiastical doctrine of confessions, if contrary to the common-law rule, does not bind the Divorce Court.<sup>5</sup> But we saw that on this question the ecclesiastical and common law are identical.<sup>6</sup> And in a subsequent case, wherein this one was cited, the court gave no practical effect to the intimation. It was a dissolution suit on the ground of the wife’s adultery, and the evidence against her consisted only of her written and verbal admissions and the paramour’s verbal ones; yet the court, being satisfied on the whole evidence that there was no collusion, and the confession was genuine, granted the divorce.<sup>7</sup> Thus the English doctrine is shown to be identical with the American as stated in preceding sections. Again,—

§ 727. **An Arkansas Statute**—provided that “like process and proceedings shall be had in divorce cases as are had in other cases on the equity side of the court.” Still, a divorce would not be granted on a bill taken *pro confesso*, without evidence to establish the offence charged.<sup>8</sup>

§ 728. **Excluding Confessions.**—The chief modification, known

*v. Jones*, 2 C. E. Green, 351, 352; *Lyon v. Lyon*, 62 Barb. 138; *Johns v. Johns*, 29 Ga. 718; *Bergen v. Bergen*, 22 Ill. 187; *McDermott’s Appeal*, 8 Watts & S. 251; *Buckholts v. Buckholts*, 24 Ga. 238; *Sheffield v. Sheffield*, 3 Tex. 79.

<sup>1</sup> *Burgess v. Burgess*, 2 Hag. Con. 223, 227, 4 Eng. Ec. 527, 529.

<sup>2</sup> *S. v. Libby*, 44 Me. 469, 479, 69 Am. D. 115.

<sup>3</sup> *Shillinger v. Shillinger*, 14 Ill. 147;

*Armstrong v. Armstrong*, 32 Missis. 279, 288.

<sup>4</sup> 20 & 21 Vict. c. 85, § 48; Vol. I. § 153, note.

<sup>5</sup> *Robinson v. Robinson*, 1 Swab. & T. 362, 393.

<sup>6</sup> Ante, § 708-710.

<sup>7</sup> *Williams v. Williams*, Law Rep. 1 P. & M. 29, 31.

<sup>8</sup> *Welch v. Welch*, 16 Ark. 527.

only in a few of our States, consists of the unwise exclusion of all confessions, whereby a party is sometimes cut off from the most conclusive evidence, to the utter denial of justice.<sup>1</sup> To illustrate, the provision in Texas being that "the decree of the court shall be rendered upon full and satisfactory evidence, independent of the confession or admission of either party," the record of a husband's conviction for an assault on his wife, founded on his plea of guilty, was excluded.<sup>2</sup>

§ 729. **Statute not excluding.**—A California statute forbade divorce "by default of the defendant," or "on the admission or statement of either party, but in all cases the court shall require proof of the facts alleged as the ground for a divorce." And this provision was construed to be "in affirmance of the common law," and to be interpreted "as was the rule by that law." Therefore, where the other testimony and the circumstances negative collusion, and leave no doubt of the truth of the confessions, the court will act upon them. This is so alike in nullity suits and in suits to dissolve valid marriage.<sup>3</sup>

### § 730. *The Doctrine of this Chapter restated.*

It not being competent for married persons to divorce themselves, and dissolutions, judicial separations, and decrees of nullity being permitted only when approved by law, and the public

<sup>1</sup> Richardson v. Richardson, 4 Port. 467, 30 Am. D. 538; Gray v. Gray, 15 Ala. 779; Jordan v. Jordan, 17 Ala. 466; Hansel v. Hansel, Wright, 212; Brainard v. Brainard, Wright, 354.

<sup>2</sup> Endick v. Endick, 61 Tex. 559. Other Texas cases are Simons v. Simons, 13 Tex. 468; Sheffield v. Sheffield, 3 Tex. 79, 83; Wright v. Wright, 3 Tex. 168, 176; Mathews v. Mathews, 41 Tex. 331. See also Bascom v. Bascom, Wright, 632, 633; Gray v. Gray, 15 Ala. 779; Cornelius v. Cornelius, 31 Ala. 479; Moyler v. Moyler, 11 Ala. 620; Miller v. Miller, Saxton, 386; Anthony v. Anthony, 3 Stock. 70. As to Alabama, Rice, J. said in a case later than most of those above cited from this State, that the Act of 1824 made confessions inadmissible; but the code now in force provides that "no decree can be rendered on the confessions of the parties." He explained: "The code makes them insuffi-

cient, but does not absolutely exclude them. It makes them *admissible*, but forbids the rendition of a decree for divorce when they constitute the only evidence of the alleged cause for divorce. It does not, however, forbid the rendition of such decree when they do not constitute the only evidence, but are proved in conjunction with other circumstances and conduct which confirm or tend to confirm them, and repel the idea of collusion between the parties. A decree for divorce rendered on confessions, *and conduct and circumstances*, is not a decree 'rendered on the confessions of the parties,' within the meaning of the code." King v. King, 28 Ala. 315, 319. And see further on this question, Hanberry v. Hanberry, 29 Ala. 719.

<sup>3</sup> Baker v. Baker, 13 Cal. 87, 98; Evans v. Evans, 41 Cal. 103. And see note to the last section.

being a party to the divorce suit to the extent that it may forbid any sentence violative of its laws and policy, judgment for divorce cannot be rendered on default or upon any confession whether made in or out of court. Were it otherwise, a husband and wife, seeking divorce, might by combining procure it on a false admission or confession, to the overthrow of public justice and the degradation of marriage. At the same time, if it is affirmatively shown that the parties are honest contestants, and there is no collusion, a confession made under circumstances excluding mistake, may be high evidence, and, in connection with proof that there is no collusion, adequate. All agreements promotive of divorce, or withholding facts from the court, or tending to mislead the court, are unlawful and void.



## CHAPTER XXII.

## THE MARRIAGE AND PROOFS THEREOF IN THE DIVORCE SUIT.

§ 731. Introduction.

732-741. Marriage and generally of Proofs.

742-757. Nature of the Proofs.

758. Doctrine of Chapter restated.

§ 731. **How Chapter divided.** — We shall consider, I. The Marriage and generally of the Proofs; II. The Nature of the Proofs.

*I. The Marriage and generally of the Proofs.*

§ 732. **Indispensable.** — Without a marriage, there can be no breach of matrimonial duties, — no suspension or dissolution of a marital relation which does not exist. Therefore, in every divorce suit, there must be a marriage and it must be proved;<sup>1</sup> it is the foundation of the whole proceeding.<sup>2</sup> So that —

§ 733. **The Decree,** — or sentence of divorce, in effect and in form,<sup>3</sup> both affirms the marriage and declares the separation or dissolution.<sup>4</sup> And afterward the divorce record, where there was notice or an appearance, is in other issues evidence of the marriage.<sup>5</sup>

§ 734. **In what Causes.** — The doctrine we are considering applies to all suits for setting up, declaring null, dissolving, or in any way modifying a marriage status. But in the books some

<sup>1</sup> Cooper v. Cooper, 7 Ohio, 2d pt. 238; Johnson v. Johnson, 114 Ill. 611, 55 Am. R. 883; Collins v. Collins, 80 N. Y. 1; Ayl. Parer. 50.

<sup>2</sup> Hamerton v. Hamerton, 2 Hag. Ec. 8, 4 Eng. Ec. 13; Zule v. Zule, Saxton, 96; Guest v. Shipley, 2 Hag. Con. 321, 4 Eng. Ec. 548; Best v. Best, 1 Add. Ec. 411, 2 Eng. Ec. 158, 160; Clowes v. Clowes, 9 Jur. 356; Sinclair v. Sinclair, 1 Hag. Con. 294, 4 Eng. Ec. 412; Williams v. Dormer, 16

Jur. 366, 9 Eng. L. & Eq. 598; Tarbell, Petitioner, 32 Me. 589; Wright v. Wright, 6 Tex. 3; Evans v. Evans, 1 Swab. & T. 328; Harman v. Harman, 16 Ill. 85.

<sup>3</sup> Coote Ec. Pract. 346, 357.

<sup>4</sup> Mayhew v. Mayhew, 3 M. & S. 266, 2 Phillim. 11.

<sup>5</sup> Halbrook v. S. 34 Ark. 511, 36 Am. R. 17. See Moore v. Hegeman, 92 N. Y. 521, 44 Am. R. 408.

misapprehensions appear which, with other things not disputed, require explanation. Thus, —

§ 735. **In Alimony without Divorce — (Estoppel).** — If by cohabiting with a woman or otherwise a man holds her out to be his wife when she is not, he is liable to one who innocently supplies her with necessaries, to the same extent as though she were such in fact. But as to the future he may recede from this position, if he chooses to disclose the truth.<sup>1</sup> Misapplying this doctrine, some judges would seem to have deemed such holding out to be sufficient in the suit for alimony without divorce, explained in our first volume,<sup>2</sup> — he being estopped to deny the marriage. But perhaps the cases under this head should be interpreted as having proceeded on their special facts.<sup>3</sup> Other cases do not bear this aspect.<sup>4</sup> The law's reasoning is conclusive; namely, that the estoppel from a holding out is not forever binding like an actual marriage, and a man cannot be compelled, as a thing alone of the future, to aliment a woman with whom he is not cohabiting, and whom he is not then passing off as his wife, unless she is truly such. The same reasoning is, at least, equally applicable —

§ 736. **In Bed and Board.** — We have some early American cases wherein proof of a marriage admitted by the defendant appears to have been deemed not necessary in the suit for divorce from bed and board.<sup>5</sup> Of course, in the absence of the admission, the marriage must be proved.<sup>6</sup> But the mass of authorities, English and American, require proof of it, in all cases, whether the divorce sought is from bed and board or from the bond of matrimony; nor do they suffer this fact, more than any other, to be established by the sole admissions of the defendant. Plainly the canon, and the reason of it, apply as well to the marriage as to any other part of the plaintiff's case.<sup>7</sup>

<sup>1</sup> Vol. I. § 1150, 1198, 1199.

<sup>2</sup> Vol. I. § 1383-1421.

<sup>3</sup> *Dillon v. Dillon*, 60 Ga. 204; *McDonald v. Fleming*, 12 B. Monr. 285. And see *Trimble v. Trimble*, 2 Ind. 76.

<sup>4</sup> *Purcell v. Purcell*, 4 Hen. & Munf. 507. See post, § 927.

<sup>5</sup> *Hill v. Hill*, 2 Mass. 150; *Helms v. Franciscus*, 2 Bland, 544, 20 Am. D. 402; *Harman v. Harman*, 16 Ill. 85.

<sup>6</sup> *Williams v. Williams*, 3 Greenl. 135. See, also, *Jones v. Jones*, 18 Me. 308, 36 Am. D. 723.

<sup>7</sup> Ante, § 710, 711, 732, and cases there cited. In California, under the statutory provision that "no divorce shall be granted in any action by default of the defendant, nor on the admission or statement of either party, but in all cases the court shall require proof of the facts alleged as the grounds for divorce," it was held that the marriage is sufficiently proved by the defendant's admission, or failure to traverse the allegation of it in the complaint, and the fact of the marriage need not be found; Rhodes, J. observing: "The marriage is

§ 737. **In Nullity Suit.** — Even in the suit for nullity, the object whereof is to obtain a judicial declaration that what was supposed or claimed to be a marriage did not constitute matrimony, the ceremony or other like thing sought to be set aside must be proved.<sup>1</sup>

§ 738. **In the Ecclesiastical Practice,** — if the defendant denied the fact or validity of the alleged marriage, the proceeding became a suit for nullity. The question of the marriage was first settled. If it was affirmed, the alleged breach was inquired into afterward.<sup>2</sup> And he was required either to deny or admit the marriage at once on the introduction of the libel.<sup>3</sup>

§ 739. **Our Practice,** — which is not uniform in the several States, but in nearly all is less flexible, is believed not commonly to require the marriage, when denied, to be proved at a trial separate from the dereliction. Yet doubtless in most of the States this may be done at the discretion of the court.

§ 740. **Sort of Marriage.** — It was in an early Massachusetts case laid down that whether there may be or not a marriage good for some purposes and ill for others, one not valid by the statute cannot by the statute be dissolved.<sup>4</sup> In reason, if the marriage is valid, it is immaterial whether the law making it such is unwritten or statutory, the two forms of law not being distinguishable. And any law of divorce is available to any injured party. In an English case, Dr. Lushington apparently laid down the proposition that any marriage which cannot be set aside on a proceeding for nullity will sustain a sentence of separation for adultery. “If I could not pronounce the marriage void,” he said, “it almost follows, as it seems to me, that I must pronounce it valid for certain purposes, and if for certain purposes, valid for the husband or wife, as the case might be, to obtain a separation for a violation of the marriage vow.” The marriage under consideration was contracted *per verba de præsenti*, without the presence of a priest, in a British colony; and the court, subse-

in no sense a ground for the divorce.”  
Fox v. Fox, 25 Cal. 587, 590.

<sup>1</sup> Aughtie v. Aughtie, 1 Phillim. 201, 1 Eng. Ec. 72.

<sup>2</sup> Montague v. Montague, 2 Add. Ec. 375, 2 Eng. Ec. 350; Mayhew v. Mayhew, 2 Phillim. 11, 1 Eng. Ec. 166; Brown

v. Brown, 2 Hag. Ec. 5, 4 Eng. Ec. 11; Robins v. Wolseley, 2 Lee, 149, 6 Eng. Ec. 75. This is also the rule in Scotland. 1 Fras. Dom. Rel. 659.

<sup>3</sup> Coote Ec. Pract. 336.

<sup>4</sup> Mangue v. Mangue, 1 Mass. 240.

quently to *The Queen v. Millis*,<sup>1</sup> adjudged it sufficient to authorize a divorce.<sup>2</sup> Practically, with us, the only doubt will relate to —

§ 741. **Voidable Marriage.** — Under the ecclesiastical practice, it is plain that if the marriage disclosed was voidable, the court would decree its nullity, and there could be no occasion for the suit to go further.<sup>3</sup> Even in the English Divorce Court, a defendant can set up the voidability of the marriage, and have it declared null.<sup>4</sup> A further question was once raised but not decided; namely, if one of the parties is shown to have been impotent at the solemnization, yet his right to a decree of nullity is barred by delay or insincerity, will the marriage suffice for the divorce?<sup>5</sup> In principle, it will; because now the marriage, which is no longer liable to be avoided, is for all purposes good. And this principle settles a further proposition; namely, that in voidable marriage of the sort which can be affirmed at the party's will, he has the option to rely or not on the impediment. If, under a practice which does not give defendants affirmative relief, one sued for divorce chooses not to ask a continuance with permission to bring a nullity suit, he may in reason be deemed to have waived his objection to what would make the marriage, not void, but voidable. And an Illinois case seems to hold that in divorce suits the fact only of a marriage need be proved, not its legality. This evidence would doubtless everywhere establish it *prima facie* as legal and valid. Yet Scates, J., said: "I apprehend a mere *de facto* or cohabitation marriage, and an unlawful marriage, such as is void as being within the degrees of consanguinity, or between white and colored persons, may be dissolved by decree, or declared void."<sup>6</sup>

<sup>1</sup> Vol. I. § 400-407.

<sup>2</sup> *Catterall v. Catterall*, 1 Rob. Ec. 580, 581, 583. And see Vol. I. § 407. See also *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 330, where Lord Stowell said: "All persons who stand in the relation of husband and wife, in any way the law allows, as by a foreign marriage, or by a domestic marriage not contrary to law, have claim to relief on the violation of any matrimonial duty." In our States, where consent *per verba de præsenti* alone is generally held to be a good marriage at the common law, and perhaps also where statutory forms are indispen-

sable, it is difficult to see how this question can practically arise. The relation of husband and wife, it would seem, must either exist or not, the law having made no provision for an intermediate state. There may be issues in which the *proof* of a marriage would fail, when it would prevail in other issues. Vol. I. § 419, 921-925.

<sup>3</sup> Ante, § 737.

<sup>4</sup> *Serrell v. Serrell*, 2 Swab. & T. 422; *G. v. G.* Law Rep. 2 P. & M. 287.

<sup>5</sup> Anonymous, Deane & S. 295.

<sup>6</sup> *Harman v. Harman*, 16 Ill. 85, referring to Rev. Stats. 1845, p. 196, § 1.

II. *The Nature of the Proofs.*

§ 742. **In a Nullity Suit**, — the marriage to be avoided differs in its nature and the proofs from the valid marriage whereon is founded an ordinary divorce suit.<sup>1</sup> Yet the books do not much explain the distinction. In England, where a husband sought the nullity of his Scotch marriage on the allegation that the wife had a former husband living, Dr. Swaby, after explaining that the direct evidence of the marriage fact was unsatisfactory, added: “Nor is this lack of primary evidence at all compensated for by any secondary proof in the cause, as of consummation, cohabitation, mutual acknowledgments, &c. For, even granting such secondary proof to be admissible in the case, which is very doubtful (it being a case brought *inter vivos*, and by the one against the other contracting party), save only in corroboration of other and more direct testimony, — namely, that of persons present (there being persons still living vouched to have been present) at the alleged fact of marriage, — yet still, of the little of such secondary proof as appears in the cause, the whole is extra-libellate, and so, strictly speaking, no proof.” But he deemed that if a person other than one of the married parties had been the plaintiff, and proof of the fact of the marriage was not in his power, it might still be declared void; the decree being “void, if any such were had.”<sup>2</sup> By the general rule, the decree affirms the fact of the pretended marriage, as well as pronounces it void.<sup>3</sup> Through the remainder of this sub-title we shall consider —

§ 743. *The Proofs of the Valid Marriage in the Ordinary Divorce Suit*: —

**Already** — in the first volume, in a series of chapters,<sup>4</sup> we have considered the evidence of marriage in its various aspects, without special reference to divorce. It only remains here to inquire after any peculiarities attaching to the divorce suit. As to which, —

§ 744. **Not well defined.** — Dr. Lushington said in 1838: “I do not know that there is in the books any express authority for the

<sup>1</sup> Ante, § 737.

<sup>2</sup> *Nokes v. Milward*, 2 Add. Ec. 386, 397, 399, 2 Eng. Ec. 356, 362, 363, and

cases in the notes. And see *Lindsay v. Lindsay*, 15 Stew. Ch. 150.

<sup>3</sup> *Coote Ec. Pract.* 402, 424.

<sup>4</sup> Vol. I. § 921-1182.

*quantum* and species of evidence.”<sup>1</sup> And what was true then has become no less so since.

§ 745. **The Doubt**—is whether what is commonly termed a fact of marriage<sup>2</sup> must be shown, as in indictments for polygamy and in actions for seduction; or whether such evidence as of cohabitation and repute, which derives its significance from the legal presumption of innocence,<sup>3</sup> is sufficient. Now, —

§ 746. **Doctrine in Principle defined.**—Where the divorce suit is for adultery, the same reasons which require proof of the fact of marriage, in distinction from mere cohabitation and repute, in the indictment for adultery or for polygamy,<sup>4</sup> prevail, there being no distinction between criminal evidence and civil to establish issues in substance identical.<sup>5</sup> But in the divorce suit for cruelty, the reasoning is different. A man who beats a woman is indictable whether she is his wife or not,<sup>6</sup> so that the battery has no influence on the question of marriage. Therefore, for the reasons explained in the first volume, evidence by cohabitation and repute will establish the marriage in the divorce suit for cruelty. In desertion, there is no scope for the considerations which govern adultery; so that cohabitation, repute, and the like are good in evidence, but the termination of the cohabitation by the desertion will greatly impair its efficacy.<sup>7</sup> From these propositions the reader may derive the rule in principle governing the proof of marriage in the divorce suit for any other cause. Turning now to the confusion of the books, —

§ 747. **In Divorce Bills**—before the House of Lords, “the usual course,” says Macqueen, “is to produce and prove an examined copy of the entry in the marriage register; and then to call a witness who was present at the ceremony, and acquainted with the parties. Such evidence, however, cannot always be obtained. But the best proof must be tendered that the circumstances of the case will admit of.”<sup>8</sup>

§ 748. **In the Ecclesiastical Practice**, — the libel, whether for adultery or for cruelty, pleaded in form both a fact of marriage

<sup>1</sup> Cood v. Cood, 1 Curt. Ec. 755, 763, 6 Eng. Ec. 452, 456.

<sup>2</sup> Vol. I. § 1032.

<sup>3</sup> Vol. I. § 931-943, 1026

<sup>4</sup> Vol. I. § 1037, 1038.

<sup>5</sup> 1 Bishop Crim. Proced. § 1046.

<sup>6</sup> Lord Stowell said in a divorce suit

for cruelty: “The case indeed is civil, as has been repeatedly observed, but the facts undoubtedly are criminal.” Evans v. Evans, 1 Hag. Con. 35, 4 Eng. Ec. 310, 313.

<sup>7</sup> Vol. I. § 984.

<sup>8</sup> Macq. Parl. Pract. 535.

celebrated, and cohabitation and repute following.<sup>1</sup> When we consider the course of proceeding in these courts, the conclusion from this is, simply, that proof of cohabitation and repute is relevant to the issue; but whether it alone is sufficient we must learn elsewhere.

§ 749. **In a Jactitation Suit**,—defended by pleading a legally solemnized marriage, the officiating clergyman and one of the two witnesses were dead, and the other could not identify the parties. Attempted circumstantial evidence failed, but Dr. Radcliff added: “It is proper to contradict a notion that a marriage in such a case could not be proved by circumstances, cohabitation, and acknowledgment.”<sup>2</sup> Clearly, according to our defining, this issue does not involve the technical “fact of marriage;” if it did, still circumstantial evidence might establish it.<sup>3</sup>

§ 750. **In an Alimony Case**,<sup>4</sup>—cohabitation, repute, and the defendant’s former admissions contrary to the denial of his plea, were adjudged adequate; and this view accords with our reasoning above. But the Chancellor distinguished the case from indictments and criminal-conversation suits, thus: “But the *virtuous* act of matrimony may in this case, as in many others, be proved by cohabitation, name, reputation, and other circumstances.”<sup>5</sup> So—

§ 751. **Various Divorce Cases**—in our books furnish authority for proving the marriage by the same evidence as in ordinary civil issues.<sup>6</sup> This, in suits other than for adultery, substantially accords with our defining.<sup>7</sup>

§ 752. “**Strict Proof**—of the status of the parties,” said Lord Brougham in the Privy Council, is indispensable to divorce from bed and board; but there was no explanation of what would constitute such proof.<sup>8</sup>

§ 753. **In an Adultery Case**—before Dr. Lushington, it appeared that the parties were voyaging to Barbadoes intending there to be married. A witness wrote to the Governor for a license; after an interval wherein the ceremony was assumed to have been performed, they returned to the ship, and they afterward conducted

<sup>1</sup> Coote Ec. Pract. 320, 350.

<sup>2</sup> Bodkin v. Case, Millward, 355, 361.

<sup>3</sup> Vol. I. § 1039–1046.

<sup>4</sup> Vol. I. § 1383–1421.

<sup>5</sup> Purcell v. Purcell, 4 Hen. & Munf. 507, 512.

<sup>6</sup> For example, Morris v. Morris, 20 Ala. 168; Wright v. Wright, 6 Tex. 3;

Trimble v. Trimble, 2 Ind. 76; Harman v. Harman, 16 Ill. 85; Hitchcox v. Hitchcox, 2 W. Va. 435; Burns v. Burns, 13 Fla. 369, 380; Davis v. Davis, 1 Abb. N. Cas. 140; Applegate v. Applegate, 18 Stew. Ch. 116.

<sup>7</sup> Ante, § 746.

<sup>8</sup> Mellin v. Mellin, 2 Moore, P. C. 493.

and were treated as husband and wife. The learned judge would not decide whether this was alone sufficient evidence, there being other, making with this the proofs satisfactory.<sup>1</sup>

§ 754. **In a Cruelty Case** — before the same judge, a marriage in Scotland was pleaded, with the entry in the Scotch register offered as an exhibit. “You must be aware,” he said, speaking to the admissibility of the libel, “that banns are not proclaimed in one case in fifty in Scotland; and it does appear to me that this being nothing more than a certificate of the session clerk, and he not being authorized by the law of Scotland to keep a register, when we come to the proof of this marriage we shall have much difficulty in establishing it upon this document. You must have the evidence of persons who were present at the marriage, for I do not think that I shall receive this certificate. The fact of marriage, in these proceedings and in actions for criminal conversation, must be proved in a different manner from a marriage in all other cases whatever.”<sup>2</sup> The doctrine of this *dictum* thus laid down in a cruelty suit, it is perceived, is in flat contradiction both of our defining and of numerous adjudged cases.<sup>3</sup> Now, —

§ 755. **In Authority**, — the rule derivable from the “weight” of the cases, as the expression sometimes is, permits the marriage to be proved in the average divorce suit by the same evidence of cohabitation, repute, and their various shadows, as in ordinary civil issues. And the authorities do not, on the whole, preclude our making, as in principle we should, an exception in the divorce suit for —

§ 756. **Adultery**. — All the reasons<sup>4</sup> command us, in the divorce suit for adultery, to require the same evidence of the marriage

<sup>1</sup> Cood v. Cood, 1 Curt. Ec. 755, 6 Eng. Ec. 452. See also Davis v. Davis, 1 Abb. N. Cas. 140; Hervey v. Hervey, 2 W. Bl. 877; Kenrick v. Kenrick, 4 Hag. Ec. 114, 129; Duncan v. Duncan, 2 Monthly Law Mag. 612; Mitchell v. Mitchell, 11 Vt. 134; Hout v. Hout, Wright, 156; s. c. 5 Ohio, 539; Prince v. Prince, 1 Rich. Eq. 282.

<sup>2</sup> Saunders v. Saunders, 10 Jur. 143, 144. The home registry of an India marriage was admitted in Ratcliff v. Ratcliff, 1 Swab. & T. 467. **In the Divorce Court**, — there have been on this subject some decisions, but they are not particularly helpful. Patrickson v. Patrickson,

Law Rep. 1 P. & M. 86; McKechnie v. McKechnie, 1 Swab. & T. 550; Rooker v. Rooker, 3 Swab. & T. 526; Limerick v. Limerick, 4 Swab. & T. 252; Abbott v. Abbott, 4 Swab. & T. 254.

<sup>3</sup> In an ecclesiastical proceeding for incest, the same learned judge intimates that the evidence may vary with the tribunal, — a doctrine which plainly could not find favor in an American court. Woods v. Woods, 2 Curt. Ec. 516, 522, 7 Eng. Ec. 181, 184.

<sup>4</sup> Consult, for example, Clayton v. Wardell, 5 Barb. 214, 4 Comst. 230; Holmes v. Holmes, 6 La. 463, 26 Am. D. 482; Cargile v. Wood, 63 Mo. 501.



which from early times the English courts, since and to the present day followed by the American, have required in the civil suit for criminal conversation, and in the criminal for polygamy,<sup>1</sup>—rejecting unaided cohabitation with its shadow repute as not being alone sufficient. To briefly restate the doctrine, as explained in the first volume, if in the ordinary civil issue it appears that the parties were cohabiting as husband and wife under the reputation of being such, the law presumes them to be innocent of any violation of law or the good order of society, therefore to be married. There is nothing to rebut this presumption. But in the divorce suit, if the accusation is that the woman was the wife of A. and committed adultery with B., the presumption of the lawfulness of her proven commerce with B. is the same as of that with A.,—simultaneously leading to the conclusion that she was the wife of B., and that she was the wife of A. Consequently the one presumption neutralizes the other, and further evidence, technically termed proving a fact of marriage, is required.<sup>2</sup>

<sup>1</sup> Vol. I. § 1026, 1036, 1037, 1042.

<sup>2</sup> In *White v. White*, 82 Cal. 427, the court proceeded under the misapprehension that the words “lawful” and “unlawful,” in expositions like that in the text, are synonymous with “indictable” and “non-indictable,”—leading to the conclusion that this doctrine is not to be applied in a State wherein adultery is not punishable as crime. It is not so punishable in England, yet this doctrine is and always has been there applied to the civil suit for criminal conversation. And it has been and is applied in the same way in our American courts. In both countries, it extends as well to civil wrongs as to criminal. And adultery is everywhere a civil wrong (Vol. I. § 1358, 1360, 1361, 1366, 1369), and everywhere a violation of the good order of society. Even more widely, as said in our first volume, the *prima facie* presumption “is universal that a thing which is shown to have been done was done rightly; as, that an estate was settled by the methods which the law directs, that a claim presented against a city was in writing when the law so requires, and that the action of a board of public affairs conformed to its own rules.” Vol. I. § 931. In another adultery divorce suit in the same State,

wherein, if the fact was material, as probably it was not, there had been in form a marriage between the defendant and *particeps criminis*, the intermarriage of the parties litigant was not allowed to be presumed from their former matrimonial cohabitation, with the reputation of being married persons. Said Cope, J.: “The general rule that in actions of this nature the marriage may be inferred from the cohabitation of the parties, we do not understand to be applicable. We cannot indulge this inference without presuming that the defendant has been guilty of the crime of bigamy; and the fact that it involves such a presumption is sufficient to repel it. In the absence of criminative proof, it is never to be supposed as a matter of legal presumption that a person has violated the criminal law; and the presumption in favor of innocence, says a learned writer, is not confined to proceedings instituted with a view of punishing the supposed offence, but holds in all civil suits where it comes collaterally in question.” Nor, it was deemed, did this result contravene the statute which, the judge observed, “provides that in prosecutions for bigamy it shall not be necessary to prove either of the marriages by the register or certificate thereof, or other

§ 757. **Doctrine as affected by Legislation.** — In some of our States, legislation has relieved the courts of technical rule by providing that cohabitation, repute, and other like circumstantial evidence shall be competent in all causes of divorce. As to this, the reader is referred to observations in the first volume.<sup>1</sup>

§ 758. *The Doctrine of this Chapter restated.*

There can be no divorce without a preceding marriage, no violation of the duties of a marriage which does not exist. Therefore in every divorce suit a marriage must be both alleged and proved. The proof of it does not in most cases differ from that of marriage in other and ordinary civil issues. But as in the civil action for criminal conversation, — in other words, for adultery, — what is termed a fact of marriage in distinction from cohabitation and marriage repute must be made to appear, so must it also, and for the same reason, in the divorce suit for adultery. The particulars need not be repeated.

record evidence, but that the same may be proved by such evidence as is admissible to prove a marriage in other cases." The effect of this statute was merely to dispense with the record. It was added: "The clause providing that the marriage may be proved by such evidence as is ad-

missible to prove a marriage in other cases does not derogate from this view; for in other cases there is no uniform rule upon the subject." *Case v. Case*, 17 Cal. 598, 600, 601, 602.

<sup>1</sup> Vol. I. § 1139-1142.

## CHAPTER XXIII.

## FURTHER OF THE PROOFS AND WITNESSES.

§ 759. Introduction.

760-771. In General of the Proofs.

772-790. The Witnesses.

791, 792. Depositions.

793. Doctrine of Chapter restated.

§ 759. **How Chapter divided.** — We shall consider, I. In General of the Proofs; II. The Witnesses; III. Depositions.

I. *In General of the Proofs.*

§ 760. **Elsewhere and here.** — The evidence of marriage having been considered in the last chapter, to this one is assigned the evidence to the other issues common in all divorce causes. What pertains simply to particular issues is treated of under their several titles: for example, the evidence of connivance is in the chapter on "Connivance;" of cruelty, in the chapter on "Cruelty."

§ 761. **The Burden of Proof** — is, of course, on the party alleging that the other committed a matrimonial wrong; for such is but the common rule, applicable in all litigation. Now, —

§ 762. **How much Evidence** — "**Reasonable Doubt.**" — Since a divorce suit is not criminal,<sup>1</sup> it is not technically within the criminal-law rule<sup>2</sup> requiring guilt to be proved beyond a reasonable doubt.<sup>3</sup> Still, as the *delictum* alleged is always a more or less disgraceful violation of law,<sup>4</sup> an observation in the English Divorce Court is applicable that, "in all causes where a crime is imputed, the presumption of innocence must prevail until guilt has been proved. And in proportion to the gravity of the charge and the rare occurrence of the crime imputed, it is reasonable to require

<sup>1</sup> Ante, § 483-489.

<sup>3</sup> Chestnut *v.* Chestnut, 88 Ill. 548;

<sup>2</sup> See this rule particularly explained, Smith *v.* Smith, 5 Or. 186.

<sup>1</sup> Bishop Crim. Proced. § 1091-1095.

<sup>4</sup> Ante, § 756, note.

more cogent evidence to overthrow the legal presumption of innocence.”<sup>1</sup> Some of our courts carry this sort of idea so far into ordinary civil causes as to require an imputed crime to be proved in them beyond a reasonable doubt, as on an indictment.<sup>2</sup> But the reason of the law is not so, nor is such the common course in our tribunals,—the ordinary rule for all civil issues being that the finding of fact goes with the preponderance of the evidence, whether the thing to be proved is a crime or not.<sup>3</sup> And all our tribunals will apply to divorce, on this question as on the rest, its rules of civil evidence, whatever they may be;<sup>4</sup> so that commonly with us even adultery need not be established beyond a reasonable doubt.<sup>5</sup> The party charging the matrimonial offence must present more than equally balanced testimony, he must affirmatively and satisfactorily prove it;<sup>6</sup> he must overcome the presumption of innocence;<sup>7</sup> and otherwise make out his case clearly, in proportion to the gravity of the accusation and its heavy consequences.<sup>8</sup>

§ 763. **Court or Jury satisfied.**—The judge or juror, passing upon a question of guilt, must be satisfied of its existence in real truth. There is no technical rule compelling him to believe a witness, and he should not act upon testimony which he does not deem both honest and not mistaken.<sup>9</sup> Beyond which, the testimony must be legally competent and of probative force.<sup>10</sup> In the words of Dr. Lushington: “Discharging the united functions

<sup>1</sup> *N. v. N. 3 Swab. & T. 234, 238.* The learned judge added: “The crime here imputed [attempted sodomy upon the wife] is so heinous, and so contrary to experience, that it would be most unreasonable to find a verdict of guilty where there is simply oath against oath, without any further evidence, direct or circumstantial, to support the charge.”

<sup>2</sup> *Barton v. Thompson*, 46 Iowa, 30, 26 Am. R. 131; *Mott v. Dawson*, 46 Iowa, 533. See *Ellis v. Buzzell*, 60 Me. 209, 11 Am. R. 204; *Allison v. P.* 45 Ill. 37.

<sup>3</sup> 1 Bishop Crim. Proc. § 1092, 1095.

<sup>4</sup> *Chestnut v. Chestnut*, *supra*; *Henderson v. Henderson*, 88 Ill. 248; *Allen v. Allen*, 101 N. Y. 658; *Poertner v. Poertner*, 66 Wis. 644.

<sup>5</sup> *Allen v. Allen*, *supra*; *Poertner v. Poertner*, *supra*.

<sup>6</sup> *Fischer v. Fischer*, 3 C. E. Green, 300; *Jenkins v. Jenkins*, 86 Ill. 340;

*Carter v. Carter*, 62 Ill. 439; *Blake v. Blake*, 70 Ill. 618; *Watt v. Kirby*, 15 Ill. 200; *Friend v. Friend*, *Wright*, 639. And see *Brainard v. Brainard*, *Wright*, 354.

<sup>7</sup> *Bradish v. Bliss*, 35 Vt. 326.

<sup>8</sup> *Berckmans v. Berckmans*, 2 C. E. Green, 453, 1 C. E. Green, 122; *Edmond's Appeal*, 57 Pa. 232; *Dillon v. Dillon*, 3 Curt. Ec. 86, 116; *Pollock v. Pollock*, 71 N. Y. 137, 142; *Mandal v. Mandal*, 28 La. An. 556; *Derby v. Derby*, 6 C. E. Green, 36; *Hughes v. Hughes*, 44 Ala. 698. The expression in some of these cases, especially where the offence is adultery, is that it must be established beyond a reasonable doubt.

<sup>9</sup> *Post*, § 787; *Fuller v. Fuller*, 14 Stew. Ch. 460. And see *Richards v. Richards*, 48 Mich. 530; *McConahey v. McConahey*, 21 Neb. 463; *Le Brun v. Le Brun*, 55 Md. 496.

<sup>10</sup> *Dwyer v. Dwyer*, 26 Mo. Ap. 647.

of judge and jury, it is not sufficient for the court to have a moral conviction of the guilt of the party: it must be satisfied that such conviction is founded on legal evidence, applicable to legal charges.”<sup>1</sup>

§ 764. **A False Case**,—set up by a party, will arouse suspicion.<sup>2</sup>

§ 765. **Allegation and Proof**.—While “allegation without proof passes for nothing, proof without allegation passes for nothing. This is the rule in reference to all proceedings in court.”<sup>3</sup>

§ 766. **All** — (**Offence — Jurisdiction**).—The complaining party must prove every element of the offence, including whatever is necessary to the jurisdiction.<sup>4</sup> *A fortiori*, therefore, —

§ 767. **A Delictum without Sentence** — does not dissolve the marriage. After the former has transpired, it remains in full force until the latter follows.<sup>5</sup>

§ 768. **Opinions of Witnesses**.—In the ecclesiastical practice, the witnesses to adultery were asked whether or not they believed the criminal fact to have transpired at the times testified to. The judge was not bound by the answer, but he was entitled to know their opinions, and he sometimes relied thereon.<sup>6</sup> If a witness stopped short, and gave no opinion, the judge accepted this as a caution; yet, in any event, his own opinion, not the witness's, determined the decision.<sup>7</sup> We should probably look upon this peculiar practice, like that of requiring more than one witness to the principal fact,<sup>8</sup> as attaching to the ecclesiastical courts rather than to the subject-matter, and not to be adopted elsewhere.<sup>9</sup> Or if we deemed it suited to cases wherein the judge is to pass upon the testimony, still it would be unsafe to submit such evidence to a jury.<sup>10</sup>

<sup>1</sup> *Caton v. Caton*, 13 Jur. 431, 432, 433.

<sup>2</sup> *Dunn v. Dunn*, 2 Phillim. 403, 1 Eng. Ec. 280, 285.

<sup>3</sup> *Foy v. Foy*, 13 Ire. 90, 95; *Johnson v. Johnson*, 4 Wis. 135; *McQueen v. McQueen*, 82 N. C. 471.

<sup>4</sup> *Maxwell v. Maxwell*, 53 Ind. 363; *Powell v. Powell*, 53 Ind. 513; *McFarland v. McFarland*, 40 Ind. 458; *Richardson v. Richardson*, 50 Vt. 119; *Majors v. Majors*, 1 Tenn. Ch. 264; *Franz v. Franz*, 5 Stew. Ch. 483.

<sup>5</sup> *Wells v. Thompson*, 13 Ala. 793, 48 Am. D. 76.

<sup>6</sup> *Crewe v. Crewe*, 3 Hag. Ec. 123, 5 Eng. Ec. 45, 47, 51.

<sup>7</sup> *Elwes v. Elwes*, 1 Hag. Con. 269, 4 Eng. Ec. 401, 405. And see *Atkinson v. Atkinson*, 2 Add. Ec. 484, 2 Eng. Ec. 387.

<sup>8</sup> *Simmons v. Simmons*, 5 Notes Cas. 324, 11 Jur. 830; *Evans v. Evans*, 1 Rob. Ec. 165.

<sup>9</sup> See 2 Greenl. Ev. 3d ed. § 42; *Atkins v. Atkins*, Vol. I. § 1555, note; *Dunlap v. Dunlap*, *Wright*, 559; *Sheffield v. Sheffield*, 3 Tex. 79.

<sup>10</sup> And see *Cameron v. S.* 14 Ala. 546, 48 Am. D. 111. In the case of *Leary v. Leary*, 18 Ga. 696, some opinions of the witness were received, but not to the full extent indicated in the ecclesiastical practice.

§ 769. **With us**, — this practice has not been followed. The witnesses must state facts, not opinions.<sup>1</sup> We have a criminal case for adultery wherein, after pronouncing the decision of the court rejecting this evidence, the learned judge added, as to divorce suits: "The opinion of the witnesses might greatly assist the Chancellor in determining whether the offence was connived at, or whether there had been a condonation."<sup>2</sup> Thus he simply called attention to a possible distinction, but in actual adjudication in our courts it has never been made.

§ 770. **Indelicate Evidence**. — Sometimes in adultery cases, and commonly in those of impotence, the evidence is of an indelicate nature, such as no considerate person would needlessly thrust upon anybody, or especially upon a judge or jury. Yet the rights of parties can on no principle of justice be sacrificed to the tastes of others.<sup>3</sup> In the words of Lord Mansfield, "indecentcy of evidence is no objection to its being received where it is necessary to the decision of a civil or a criminal right."<sup>4</sup> Or, to quote from Lord Stowell: "Courts of law are not invested with the power of selection; they must take the law as it is imposed on them. Courts of the highest jurisdiction must often go into cases of the most odious nature, where the proceeding is only for the punishment of the offender; here the claim is for a remedy, and the court cannot refuse to entertain it on any fastidious notions of its own."<sup>5</sup> Still the latter of these learned judges observed that in consideration of the peculiar nature of the proofs in impotence suits, the court will not encourage them when brought without necessity.<sup>6</sup> And in an American court, Baltzell, C. J., speaking of offensive details of evidence, said that the courts "may and should always require the examination of witnesses to be conducted in a spirit of due delicacy, avoiding vulgar and obscene language."<sup>7</sup>

§ 771. **In other Respects**, — the evidence in divorce causes follows the ordinary rules.<sup>8</sup>

<sup>1</sup> *Richards v. Richards*, 37 Pa. 225, 228; *Bishop v. Bishop*, 30 Pa. 412, 415; *Leaning v. Leaning*, 10 C. E. Green, 241; *McKnight v. S.* 6 Tex. Ap. 158; *Cox v. Whitfield*, 18 Ala. 738.

<sup>2</sup> *Cameron v. S.* 14 Ala. 546, 551, 48 Am. D. 111, opinion by Collier, C. J.

<sup>3</sup> *Melvin v. Melvin*, 58 N. H. 569, 571, 42 Am. R. 605.

<sup>4</sup> *Da Costa v. Jones*, Cowp. 729, 734.

<sup>5</sup> *Briggs v. Morgan*, 3 Phillim. 325, 1 Eng. Ec. 408; *Harris v. Ball*, cited 2 Hag. Con. 327.

<sup>6</sup> *Guest v. Shipley*, 2 Hag. Con. 321, 4 Eng. Ec. 548. And see 1 Greenl. Ev. § 253.

<sup>7</sup> *Abernathy v. Abernathy*, 8 Fla. 243, 259.

<sup>8</sup> *Blain v. Blain*, 45 Vt. 538; *Fritz v. Fritz*, 23 Ind. 388.

II. *The Witnesses.*

§ 772. **Undue Searchings for** — A caution under this head appears in the chapter on Connivance.<sup>1</sup> It is doubtless possible to advertise for evidence in an unobjectionable way. But a party who, while a divorce suit is pending, publishes denials, advertises for evidence, or otherwise calls public attention to the cause, in a manner to prejudice it or interfere with a fair trial, has in England been deemed guilty of a contempt of court and liable to attachment.<sup>2</sup> And no reason appears why it should not be the same with us.<sup>3</sup>

§ 773. **Number of Witnesses.** — The English ecclesiastical courts never accepted the testimony of one witness uncorroborated as sufficient to establish any fact;<sup>4</sup> for instance, to prove a charge of adultery.<sup>5</sup> But this rule was connected with that of requiring answers from the party under oath, and it admits of various qualifying explanations.<sup>6</sup> The Divorce Act, antagonistic to this restriction, directed that "the rules of evidence observed in the superior courts of common law at Westminster" should prevail in the new jurisdiction.<sup>7</sup> And in the United States, without statutory help, the ecclesiastical rule is discarded,<sup>8</sup> — not having been followed, it is believed, in a single reported case.

§ 774. **Imperfect Credibility.** — The principles which in ordinary cases govern courts and juries in dealing with the evidence of a witness who is a convict,<sup>9</sup> a detective in the particular matter,<sup>10</sup> or otherwise of impaired credit,<sup>11</sup> are applied the same in the suit for divorce. In a subsequent chapter on Adultery, we shall see how it is with the alleged participants in the act, and their husbands, wives, and other third persons.

<sup>1</sup> Ante, § 213-216.

<sup>2</sup> *Brodrigg v. Brodrigg*, 11 P. D. 66; *Butler v. Butler*, 13 P. D. 73.

<sup>3</sup> 2 Bishop Crim. Law, § 256, 259.

<sup>4</sup> Ante, § 456, 768; 2 Burn Ec. Law, 238, tit Evidence.

<sup>5</sup> *Evans v. Evans*, 1 Rob. Ec. 165; *Curtis v. Curtis*, 5 Moore, P. C. 252.

<sup>6</sup> *Clutton v. Cherry*, 2 Phillim. 373, 385; *Morgan v. Hopkins*, 2 Phillim. 582, 584; *Clarke v. Douce*, 2 Phillim. 335, 339; *Saunders v. Saunders*, 11 Jur. 738, 1 Rob. Ec. 549; *King v. King*, 2 Rob. Ec. 153.

And see *Schultes v. Hodgson*, 1 Add. Ec. 105; *Dysart v. Dysart*, 3 Curt. Ec. 543; *Simmons v. Simmons*, 1 Rob. Ec. 566; *Oliver v. Heathcote*, 2 Add. Ec. 35, 41; *Dalrymple v. Dalrymple*, 2 Hag. Con. 54, 127; *Best v. Best*, 2 Phillim. 161, 169.

<sup>7</sup> Stat. 20 & 21 Vict. c. 85, § 48.

<sup>8</sup> *Atkins v. Atkins*, reported Vol. I. § 1555, note.

<sup>9</sup> *Poertner v. Poertner*, 66 Wis. 644.

<sup>10</sup> *Blake v. Blake*, 70 Ill. 618; *Moller v. Moller*, 115 N. Y. 466.

<sup>11</sup> *Borton v. Borton*, 48 Iowa, 697.

§ 775. **Relatives, Servants, Friends.** — Almost necessarily, in a large proportion of the divorce cases, the witnesses are the relatives, friends, or dependants of one or both of the parties. They have often made up their minds as to the merits of the controversy, and whether so or not their testimony is more or less influenced by preference and prejudice. “I do not imagine,” observed Dr. Lushington of a lady’s maid, “that the experience of the oldest practitioner can furnish an instance of such a person called on to depose for her mistress who had not a bias.”<sup>1</sup> Still, witnesses from these several classes are not to be rejected, but in weighing their testimony the court or jury should take all the circumstances and probable prejudices into the account.<sup>2</sup> Relationship, friendship, and dependence do not breed prejudice in all witnesses equally, nor does prejudice influence alike the testimony of all. The English ecclesiastical judges, passing upon the proofs in connection with the law, often adverted to this subject; and they deemed that the opinions of such witnesses<sup>3</sup> are to be distrusted, their testimony to facts to be credited. Near relatives were thought liable to bias toward those to whom related; servants, toward their employers. Children were regarded as subject to partisanship, but there is no presumption of a leaning to the one parent rather than the other.<sup>4</sup> Further as to —

§ 776. **Young Children.** — Children of a tender age, and especially while too immature to comprehend those delicate facts which often arise in adultery cases, are particularly liable to misapprehend them. It is a misfortune to such children to be called. Still if they have the general discretion to be witnesses, their exclusion would constitute a denial of justice not competent for the court.<sup>5</sup> But where their evidence stands alone, the tribunal will hesitate or decline to grant a divorce for adultery thereon.<sup>6</sup>

<sup>1</sup> *Dysart v. Dysart*, 1 Rob. Ec. 106, 127.

<sup>2</sup> *Lockwood v. Lockwood*, 2 Curt. Ec. 281, 282, 7 Eng. Ec. 114, 115; *Hughes v. Hughes*, 44 Ala. 698; *Edmond’s Appeal*, 57 Pa. 232; *Kneale v. Kneale*, 28 Mich. 344. And see *Burroughs v. U. S.*, 2 Paine, 569.

<sup>3</sup> Ante, § 768.

<sup>4</sup> *Lockwood v. Lockwood*, 2 Curt. Ec. 281, 289, 7 Eng. Ec. 114, 118; *Saunders v. Saunders*, 5 Notes Cas. 413, 417, 1 Rob. Ec. 549, 555; *D’Aguilar v. D’Aguilar*, 1

Hag. Ec. 773, 782, 3 Eng. Ec. 329, 335; *Dillon v. Dillon*, 3 Curt. Ec. 86, 102, 7 Eng. Ec. 377. And see *S. v. Nash*, 8 Ire. 35; *Ciocci v. Ciocci*, 26 Eng. L. & Eq. 604, 613, 1 Spinks, 121; *Chesnutt v. Chesnutt*, 1 Spinks, 196, s. c. nom. *C. v. C.* 28 Eng. L. & Eq. 603; *Berckmans v. Berckmans*, 2 C. E. Green, 453; *Ware v. Ware*, 8 Greenl. 42; *Murray v. Murray*, 66 Tex. 207; *Pond v. Pond*, 132 Mass. 219.

<sup>5</sup> Ante, § 770.

<sup>6</sup> *Crowner v. Crowner*, 44 Mich. 180, 38 Am. R. 245. In this case, the court



§ 777. *The Parties as Witnesses*:—

**Two Impediments.**—Under the unwritten law, a party to a suit could not be a witness therein, both because he was a party and because he was interested.<sup>1</sup> And independently of this doctrine, husband and wife could not testify for or against each other.<sup>2</sup> On both of these grounds, they were incompetent witnesses in their divorce suits.<sup>3</sup> Still,—

§ 778. **Sworn Answer in Equity.**—Where the proceeding is in equity, and the answer is on demand of the party sworn to, pursuant to a requirement of law, the ordinary equity rules as to its effect appear to prevail in divorce cases substantially the same as in others;<sup>4</sup> except that, as already made evident, there can be no decree of divorce simply on bill and answer.<sup>5</sup> Now,—

§ 779. **Modern Statutes,**—both in England and in most of our States, have on this subject more or less superseded the unwritten law and changed the rules of evidence. But they are not uniform in their terms and effect.

§ 780. **In England,**—the statutory changes proceeded step by step,<sup>6</sup> until, in 1869, the following provision, which it is believed

would not decree a divorce for adultery on the uncorroborated testimony of two children of the parties, the elder of whom was twelve years old, and both appeared "to have precocious understanding of the nature and criminality of the conduct charged," to circumstances of suspicion. And Cooley, J. said: "We had occasion in *Kneale v. Kneale*, 28 Mich. 344, to comment upon the manifest impropriety of calling children of such a tender age to testify against their mother to establish an offence against chastity. It is a great wrong to them, not only as it touches them in their natural affections, but also as it tends to destroy their purity of mind and conduct. Moreover, the evidence of such children to acts which will naturally be construed by their prepossessions and immature and incorrect notions is of very slight value, even when honestly called out and given, and is easily shaped and perverted if a dishonest father shall be so inclined." Yet neither these cases nor any other of which I am aware, affirm the right of the court to exclude children simply on the ground that their parents are the litigants, or that they are too

young to be intrusted with the knowledge of delicate things.

<sup>1</sup> 1 Greenl. Ev. § 329, 330.

<sup>2</sup> 1 Ib. § 334-336; 1 Bishop Crim. Proced. § 1151, 1154; *Kelly v. Drew*, 12 Allen, 107, 109, 90 Am. D. 138; *Stein v. Bowman*, 13 Pet. 209, 221; *Monroe v. Twisleton*, Peake Add. Cas. 219; *Cramer v. Reford*, 2 C. E. Green, 367, 90 Am. D. 594, 600; *Copous v. Kauffman*, 8 Paige, 583.

<sup>3</sup> *Perkins v. Perkins*, 88 N. C. 41; *Manchester v. Manchester*, 24 Vt. 649; *Dwelly v. Dwelly*, 46 Me. 377; *Anonymous*, 58 Missis. 15.

<sup>4</sup> See *Latham v. Latham*, 30 Grat. 307; *Derby v. Derby*, 6 C. E. Green, 36; *Stibbins v. Stibbins*, 1 Met. Ky. 476; *Moyler v. Moyler*, 11 Ala. 620; *Hughes v. Hughes*, 19 Ala. 307; *Richmond v. Richmond*, 10 Yerg. 343; *Mosser v. Mosser*, 29 Ala. 313; *Miller v. Miller*, Saxton, 386; *Marsh v. Marsh*, 1 C. E. Green, 391, 84 Am. D. 164.

<sup>5</sup> Ante, § 692; *Latham v. Latham*, supra; *Banta v. Banta*, 3 Edw. Ch. 295.

<sup>6</sup> See 9 & 10 Vict. c. 95, § 83; 14 & 15 Vict. c. 99; 22 & 23 Vict. c. 61, § 6. And

remains, was adopted for the adultery suit, leaving other statutes to make the parties competent witnesses in other divorce causes: "The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding; provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."<sup>1</sup>

§ 781. In our States,—the statutes are a good deal shifting and far from uniform. They are travelling toward, and some of them have reached, disenthralment from the several impediments of the unwritten law; so that in some of the States the parties are quite free to be witnesses in their divorce causes, in others the obstructions are partial, and in still others the old law remains unimpaired. As every practitioner has before him the statutes of his own State, it would not be compensatory to attempt here a rehearsal of their provisions.<sup>2</sup> In matter of interpretation, to state a few of the decided questions,—

consult *Pyne v. Pyne*, 1 Swab. & T. 178; *Hart v. Hart*, 2 Spinks, 193.

<sup>1</sup> 32 & 33 Vict. c. 68, § 3. And see, on the general subject of this section, *Gray v. Gray*, 2 Swab. & T. 554; *Burroughs v. Burroughs*, 2 Swab. & T. 544; *Baker v. Baker*, 3 Swab. & T. 213; *N. v. N.* 3 Swab. & T. 234; *Hudson v. Hudson*, 3 Swab. & T. 314; *Scott v. Scott*, 3 Swab. & T. 319; *Tatham v. Tatham*, 3 Swab. & T. 511; *F. v. D.* 4 Swab. & T. 86; *Jennings v. Jennings*, Law Rep. 1 P. & M. 35; *T. v. D.* Law Rep. 1 P. & M. 127; *Boardman v. Boardman*, Law Rep. 1 P. & M. 233; *U. v. J.* Law Rep. 1 P. & M. 460; *Anderson v. Anderson*, Law Rep. 1 P. & M. 512; *Bland v. Bland*, Law Rep. 1 P. & M. 513; *Blackborne v. Blackborne*, Law Rep. 1 P. & M. 563; *Ross v. Ross*, Law Rep. 1 P. & M. 629; *Harris v. Harris*, Law Rep. 2 P. & M. 77; *Hebblethwaite v. Hebblethwaite*, Law Rep. 2 P. & M. 29; *H. v. P.* Law Rep. 3 P. & M. 126; *Brown v. Brown*, Law Rep. 3 P. & M. 198; *Jackman v. Jackman*, 14 P. D. 62.

<sup>2</sup> Some of the decisions in the several

States, a few of which are not in divorce cases, but illustrative, are the following:—*Arkansas*.—*Kurtz v. Kurtz*, 38 Ark. 119; *Brown v. Brown*, 38 Ark. 324.

*California*.—*Matthai v. Matthai*, 49 Cal. 90; *Haley v. Haley*, 67 Cal. 24.

*Colorado*.—*Stebbins v. Anthony*, 5 Colo. 348.

*Georgia*.—*Castello v. Castello*, 41 Ga. 613; *Cook v. Cook*, 46 Ga. 308; *Woolfolk v. Woolfolk*, 53 Ga. 661.

*Illinois*.—*Jenkins v. Jenkins*, 86 Ill. 340; *Lorenz v. Lorenz*, 93 Ill. 376; *Wilcox v. Wilcox*, 16 Bradw. 580.

*Indiana*.—*Morse v. Morse*, 65 Ind. 156; *Smith v. Smith*, 77 Ind. 80.

*Louisiana*.—*Dillon v. Dillon*, 32 La. An. 643; *Daspit v. Ehringer*, 32 La. An. 1174.

*Maine*.—*Dwelly v. Dwelly*, 46 Me. 377.

*Massachusetts*.—*Little v. Little*, 13 Gray, 264; *French v. French*, 14 Gray, 186; *Peaslee v. McLoon*, 16 Gray, 488; *Foss v. Foss*, 12 Allen, 26; *Baldwin v. Parker*, 99 Mass. 79, 96 Am. D. 697; *Rob-*

§ 782. **"Interest in Event."**—A statute making it no obstacle to one's being a witness that he has an "interest in the event" of the suit, does not qualify the parties to testify in a divorce cause. For, it has been well observed, the common-law disqualification of husband and wife to be witnesses against each other rests upon other principles than "interest in the event of the suit, as party or otherwise." "Its foundation is in the public good. It strikes deeper than mere questions of interest, and is based upon reasons of public policy."<sup>1</sup>

§ 783. **Non-access.**—The New Hampshire statute, it has been held, does not render the husband competent, in an adultery divorce suit against his wife, to testify to his own non-access.<sup>2</sup> "It is true," said Bellows, J., "that in cases of divorce, where the questions of fact are tried by the court, the evidence of the parties is constantly received, but not upon any ground that obviates the objection to the proof of non-access by them, which rests upon views of decency, morality, and public policy."<sup>3</sup>

§ 784. **The Principle**—governing the foregoing and various

*bins v. Robbins*, 100 Mass. 150, 97 Am. D. 91; *Jacobs v. Hesler*, 113 Mass. 157.

*Michigan*.—*Hamilton v. Hamilton*, 37 Mich. 603; *Stuart v. Stuart*, 47 Mich. 566.

*Mississippi*.—Anonymous, 58 Missis. 15.

*Missouri*.—*Moore v. Moore*, 51 Mo. 118; *Berlin v. Berlin*, 52 Mo. 151; *Moore v. Wingate*, 53 Mo. 398; *Dwyer v. Dwyer*, 2 Mo. Ap. 17; *Miller v. Miller*, 14 Mo. Ap. 418.

*New Hampshire*.—*Kelley v. Proctor*, 41 N. H. 139; *Breed v. Gove*, 41 N. H. 452; *Corson v. Corson*, 44 N. H. 587; *Melvin v. Melvin*, 58 N. H. 569, 42 Am. R. 605.

*New Jersey*.—*Bird v. Davis*, 1 McCarter, 467; *Cummins v. Cummins*, 2 McCarter, 138; *Marsh v. Marsh*, 1 C. E. Green, 391, 84 Am. D. 164; *Woodworth v. Woodworth*, 6 C. E. Green, 251; *Reid v. Reid*, 6 C. E. Green, 331; *Palmer v. Palmer*, 7 C. E. Green, 88; *Tate v. Tate*, 11 C. E. Green, 55; *Belton v. Belton*, 11 C. E. Green, 449; *Shafto v. Shafto*, 1 Stew. Ch. 34; *Marsh v. Marsh*, 2 Stew. Ch. 296; *Pullen v. Pullen*, 2 Stew. Ch. 541; *Doughty v. Doughty*, 5 Stew. Ch. 32; *Sandford v. Sandford*, 5 Stew. Ch. 420; *Franz v. Franz*, 5 Stew. Ch. 483; *Wells v. Wells*, 6 Stew. Ch. 4; *Scheffling v. Scheffling*, 17 Stew. Ch. 438; *McShane v. McShane*, 18 Stew. Ch. 341.

*New York*.—*Rivenburgh v. Rivenburgh*, 47 Barb. 419, 420; *Bissell v. Bissell*, 55 Barb. 325, 7 Abb. Pr. n. s. 16; *Hennessey v. Hennessey*, 58 How. Pr. 304; *Finn v. Finn*, 12 Hun, 339; *Roe v. Roe*, 40 N. Y. Superior, 1; *Chamberlain v. P.* 23 N. Y. 85, 80 Am. D. 255.

*North Carolina*.—*Barringer v. Barringer*, 69 N. C. 179; *Perkins v. Perkins*, 88 N. C. 41.

*Pennsylvania*.—*Flattery v. Flattery*, 88 Pa. 27; *Winter v. Winter*, 7 Philad. 369; *Stevenson v. Stevenson*, 7 Philad. 386; *Bronson v. Bronson*, 8 Philad. 261; *Pyle v. Pyle*, 10 Philad. 58.

*Texas*.—*Stafford v. Stafford*, 41 Tex. 111; *Cornish v. Cornish*, 56 Tex. 564.

*Vermont*.—*Manchester v. Manchester*, 24 Vt. 649.

*West Virginia*.—*Hill v. Proctor*, 10 W. Va. 59; *Rose v. Brown*, 11 W. Va. 122.

<sup>1</sup> *Dwelly v. Dwelly*, 46 Me. 377, opinion by May, J.; Anonymous, 58 Missis. 15; *Manchester v. Manchester*, 24 Vt. 649; *Contra*, *Moore v. Moore*, 51 Mo. 118; *Berlin v. Berlin*, 52 Mo. 151. See *Dillon v. Dillon*, 32 La. An. 643; *Daspit v. Ehringer*, 32 La. An. 1174.

<sup>2</sup> Vol. I. § 1171-1174, and particularly 1179.

<sup>3</sup> *Corson v. Corson*, 44 N. H. 587, 588.

analogous interpretations under these statutes, is the obvious truth that the removal of one of several disqualifications of the parties to be witnesses<sup>1</sup> cannot make them competent while any other one, not taken away, remains.

§ 785. **Private Conversations.**—In a particular statute authorizing the parties in these cases to be witnesses, there was the qualification that they shall not “be allowed to testify as to private conversations with each other.”<sup>2</sup> And it was held not to exclude observations addressed by the one to the other, not constituting any part of a conversation.<sup>3</sup> But the fact that a conversation was in the presence of young children, not shown to have listened, does not render it admissible as not being private.<sup>4</sup>

§ 786. **“Divorce Suit”—Nullity.**—A suit to declare a marriage null is held to be within the term “divorce suit,” in a statute of the sort we are considering.<sup>5</sup>

§ 787. *The Effect of the Testimony of the Parties:—*

**Not necessarily believed.**—No court or jury, passing upon evidence, is required by law to believe any witness.<sup>6</sup> And there are classes of witnesses whose testimony is always received with caution, and rarely permitted to be adequate unless corroborated; as, for example, accomplices.<sup>7</sup> Yet under the common-law rules, while a judge will advise the jury not to find a verdict on the testimony of an accomplice uncorroborated, they may lawfully do it, and their finding will not be interfered with by the court.<sup>8</sup> A party in a divorce suit is not ordinarily, like the accomplice, of bad character; yet, like him, is under a strong temptation to falsify, and is liable to be swayed by a mistaken prejudice. The result from all which is that, in principle, it is competent for the court or jury, whichever passes upon the fact, to derive its finding solely from the testimony of a party whom a statute has made a witness, or to refuse, according as it has wrought or not the necessary belief<sup>9</sup> in the understanding. In matter of mere practice,—

<sup>1</sup> Ante, § 777.

<sup>2</sup> Mass. Stat. 1857, c. 305, § 1, re-enacted Gen. Stats. c. 131, § 14; Stat. 1870, c. 393, § 1.

<sup>3</sup> French v. French, 14 Gray, 186, 188.

<sup>4</sup> Jacobs v. Hesler, 113 Mass. 157.

<sup>5</sup> Foss v. Foss, 12 Allen, 26. As to a like statute in Missouri, see Moore v. Wingate, 53 Mo. 398; Moore v. Moore, 51 Mo.

118; Dwyer v. Dwyer, 2 Mo. Ap. 17. And see Baldwin v. Parker, 99 Mass. 79, 96 Am. D. 697. As to the earlier Massachusetts statute, see Little v. Little, 13 Gray, 264.

<sup>6</sup> Ante, § 763; 1 Bishop Crim. Proced. § 1147; Lorenz v. Lorenz, 93 Ill. 376.

<sup>7</sup> 1 Bishop Crim. Proced. § 1156 et seq.

<sup>8</sup> Ib. § 1169.

<sup>9</sup> Ante, § 762, 763.

§ 788. **Views of Ecclesiastical Judges.**—Parties in the ecclesiastical courts were compellable to testify by giving in written answers under oath.<sup>1</sup> Still, “in looking into those answers,” said Dr. Lushington, “the court is naturally anxious and always desirous not to rely upon the statements, though on oath, of a party himself, and never resorts to such statement when not made evidence by being read, except for the purpose of explaining, or bringing out a fact in favor of the opposite party.”<sup>2</sup> After a statute had made the parties witnesses, Sir John Dodson observed: “It behooves courts of justice to receive such evidence with great caution, to see that it bears the stamp of truth, to consider how far it is consistent with itself and with probability. It must also be considered how far it is consistent with the admitted facts and circumstances of the case, and with the documents produced. The court should also pay due regard to the tone of the evidence, and beware of exaggerated statements.”<sup>3</sup>

§ 789. **Later English Views.**—The Divorce Court appears to regard the testimony of the parties much as the combined court and jury do that of an accomplice in a crime under the common law.<sup>4</sup> There may be a divorce on the unaided evidence of one party when not contradicted by the other, but this will be extremely rare. And still rarer will be the instances, yet not impossible, in which the sole testimony of one of the parties will carry the divorce in opposition to the oath of the other.<sup>5</sup> Two English cases, heard in the Divorce Court, will illustrate this whole doctrine. The one was a suit for dissolution of the marriage for the wife’s alleged adultery. It was undefended, and the fact of somebody’s “cohabitation” with the alleged paramour was proved. But there was no evidence other than the petitioner’s to the identity; that is, that the woman was the wife. “I cannot,” said the judge, “grant a decree on this evidence without corroboration of any kind.” And so the hearing was adjourned until the corroborating evidence was produced.<sup>6</sup> The other was a case of impotence. The husband, who was the defendant, neither appeared to the citation nor obeyed the order for in-

<sup>1</sup> Ante, § 452.

<sup>2</sup> *Saunders v. Saunders*, 1 Rob. Ec. 549, 553.

<sup>3</sup> *Hart v. Hart*, 2 Spinks, 193, 196.

<sup>4</sup> Ante, § 787.

<sup>5</sup> *U. v. J.* Law Rep. 1 P. & M. 460;

*T. v. D.* Law Rep. 1 P. & M. 127, 129;

*Scott v. Scott*, 3 Swab. & T. 319; *Jenkins v. Jenkins*, 86 Ill. 340; *Shafto v. Shafto*,

1 Stew. Ch. 34.

<sup>6</sup> *Harris v. Harris*, Law Rep. 2 P. &

spection. The examiners of the wife's person certified that "we cannot determine whether she is a virgin." Her testimony, therefore, constituted all the evidence which could be had in the case. Yet it was clear, distinct, and to every appearance truthful. Said the judge: "No one can help feeling that the single oath of the party interested, fortified by nothing stronger than the silence of the party charged, is treacherous ground for judicial decision; but no one can deny that if this lady's story is true, her condition is one of grievous hardship. And to call for corroboration, where all corroboration is from the nature of the subject impossible, would be harder still. I have no alternative, then, but to examine and adjudicate upon the petitioner's truth, or to close the door of the court against her altogether, be her story never so true. I accept the former, and pronounce myself entirely satisfied that this marriage has never been consummated, and that the respondent is incurably impotent."<sup>1</sup>

§ 790. In our States,—the practice appears not to be quite uniform, but in a general way it is in harmony with the English. Some courts, particularly the New Jersey, performing the united functions of judge and jury, adhere closely, perhaps inflexibly, to the rule never to grant a divorce on the mere uncorroborated testimony of a party.<sup>2</sup> A contradiction from the other party will necessarily be most damaging, and we can hardly imagine a case in which it will not be effectual.<sup>3</sup> Still, a jury in Pennsylvania returned a verdict for divorce on the applicant wife's uncorroborated testimony, her husband on his oath contradicting, yet the court refused to interfere. "The law," it was observed, "has made the libellant a competent witness. Whether credible was a question for the jury and not for the court. That she was flatly contradicted by her husband did not take the case away from the jury is clear. It may be that the credibility of the wife, and the

<sup>1</sup> F. v. D. 4 Swab. & T. 86, 93. In another case of impotence, where the husband was the petitioner, and in other respects the circumstances were similar, the marriage was declared void on his sole testimony. *H. v. P.* Law Rep. 3 P. & M. 126.

<sup>2</sup> *Woodworth v. Woodworth*, 6 C. E. Green, 251, 252; *Palmer v. Palmer*, 7 C. E. Green, 88, 90; *Cummins v. Cummins*, 2 *McCarter*, 138; *Franz v. Franz*,

5 *Stew. Ch.* 483; *Sandford v. Sandford*, 5 *Stew. Ch.* 420; *Pullen v. Pullen*, 2 *Stew. Ch.* 541; *Tate v. Tate*, 11 C. E. Green, 55; *McShane v. McShane*, 18 *Stew. Ch.* 341; *Doughty v. Doughty*, 5 *Stew. Ch.* 32. And see *Woolfolk v. Woolfolk*, 53 *Ga.* 661; *Winter v. Winter*, 7 *Philad.* 369; *Stevenson v. Stevenson*, 7 *Philad.* 386; *Haley v. Haley*, 67 *Cal.* 24.

<sup>3</sup> *Wilcox v. Wilcox*, 16 *Bradw.* 580; *Scheffling v. Scheffling*, 17 *Stew. Ch.* 438.

want of credibility of the husband, were as clear to the minds of the jury as the light of noonday. On what principle, then, shall we say, though the law has made her competent, and has carried her testimony into the jury-box, she was not to be believed, and that the testimony was legally insufficient? That was a matter for the legislature in passing the law, not for us.”<sup>1</sup> “Sometimes,” said Gray, J., in a Massachusetts case, “no other evidence exists, or can be obtained. The parties are made competent witnesses by statute, and there is no law to prevent the finding of a fact upon the testimony of a party whose credibility and good faith are satisfactorily established.”<sup>2</sup>

### III. *Depositions.*

§ 791. **In General.**—Depositions are allowable in divorce causes the same as in ordinary civil ones. They should be taken conformably to the rules of the particular tribunal and the common course in this department of the law of evidence.<sup>3</sup>

§ 792. **In Defaulted Cases.**—We have seen that by a peculiarity in the divorce suit, a default settles the controversy as against the defendant, and the proofs to follow are only to satisfy the conscience of the judge and protect the interests of the public.<sup>4</sup> Therefore, in principle, the judge may direct how the evidence shall be. Where the case admits of the production of the witnesses before him or the master, he will always require it. Where depositions become necessary, he will give such directions for their taking as he deems adapted to facilitate the proceeding without putting substantial justice in peril. The course of things, in this respect, varies more or less with the court and the judge. The books do not furnish much exact information on this question. Possibly the reader may derive help from some of the cases in the note.<sup>5</sup>

<sup>1</sup> Flattery v. Flattery, 88 Pa. 27, 28.

<sup>2</sup> Robbins v. Robbins, 100 Mass. 150, 151, 97 Am. D. 91. And see Lorenz v. Lorenz, 93 Ill. 376.

<sup>3</sup> Hitchins v. Hitchins, Law Rep. 1 P. & M. 153; Miller v. Miller, Saxton, 386; Bevan v. McMahon, 2 Swab. & T. 55; Goff v. Goff, 1 Pick. 475; Douglass v. Douglass, 38 N. H. 323; Bronson v. Bronson, 4 Brews. 394; Elmes v. Elmes, 9 Pa. 166; Hood v. Hood, 2 Swab. & T. 112,

note; Looker v. Looker, 46 Mich. 68; Page v. Page, 51 Mich. 88.

<sup>4</sup> Ante, § 692, 704.

<sup>5</sup> Macartney v. Macartney, Law Rep. 1 P. & M. 259; Cooke v. Cooke, 2 Swab. & T. 50; Anonymous, 1 Yeates, 404; Booth v. Booth, 11 Vt. 206; Hout v. Hout, Wright, 156; Lattier v. Lattier, 5 Ohio, 538; Mills v. Mills, 2 Swab. & T. 310; Case v. Case, 2 Swab. & T. 65; Ling v. Ling, 1 Swab. & T. 180; Potts v. Potts, 1 Swab. & T. 181.

§ 793. *The Doctrine of this Chapter restated.*

The applicant for a divorce must affirmatively establish in evidence the dereliction on which he relies, whether the defendant admits it or not. By the better opinion, on a question open to some dispute, the court or jury passing upon the fact need not be satisfied beyond a reasonable doubt as in criminal cases, but the rule in civil ones prevails. Though a judge may sometimes be tempted to reject evidence because of its indelicate nature, or to exclude immature children of the parties because of an impropriety in calling them, still competent testimony from competent sources is a legal right of the litigants, and the court has no authority to refuse it. Under the unwritten law, the parties themselves cannot testify. But in recent years varying statutes have in most of our States given them partial or full witness capacity in divorce causes. Their testimony is liable to be closely scrutinized or even disregarded. Yet being statutory evidence, a judge cannot throw it out. Still, practically a finding will rarely be made on the uncorroborated testimony of one party, and more rarely when it is denied under oath by the other. Depositions may be used in divorce causes the same as in other civil suits. And after a default, the judge may make any reasonable special direction for the obtaining and presentation of the evidence.



## CHAPTER XXIV.

## SPECIALLY OF THE NULLITY SUIT.

§ 794. **Elsewhere and here.**—A nullity suit being mainly of the same nature, and often and by some commonly called by the same name, as the ordinary suit for divorce,<sup>1</sup> the course of these volumes is, with few exceptions, to treat of it in the chapters allotted to the divorce suit in general, — pointing out any dissimilarities at the proper places. Still a reader who desires a connected view of this suit can with little labor obtain it by consulting the index, and turning over the pages of the volumes. The purpose of this chapter is simply to make more distinct the fact that there are some differences, and to call attention to a few particulars not quite within the scope of the other chapters.

§ 795. **Voidable — Void.**—The common and more useful purpose of the suit for nullity is to make void a voidable marriage.<sup>2</sup> Yet it is employed also, when the marriage is void, to declare it so, — an object often of great importance to the parties and to the community.<sup>3</sup> And —

§ 796. **Jactitation Suit.**—To accomplish in some circumstances nearly the same thing, the English practice furnishes also the suit for jactitation of marriage, rarely resorted to in modern times.<sup>4</sup> It is available either to the man or the woman. The former, for example, complains that the latter has maliciously and without authority boasted of being his wife, and prays the court to silence her therein. She has three defences, — to deny the boasting, to set up a marriage justifying it, or to plead his permission to assume the character of wife. Only when the second defence is

<sup>1</sup> Ante, § 472, 473; post, § 808.

<sup>2</sup> Vol. I. § 265, 266, 277; ante, § 472, 473; Elliott v. Gurr, 2 Phillim. 16, 1 Eng. Ec. 166.

<sup>3</sup> Wightman v. Wightman, 4 Johns.

Ch. 343, 346; Patterson v. Gaines, 6 How. U. S. 550, 592; Martin v. Martin, 22 Ala. 86; Vol. I. § 719, 722.

<sup>4</sup> See 1 Lee, 16, note, 5 Eng. Ec. 289.

made does the suit become essentially one for nullity.<sup>1</sup> It has never been known in any of our States.

§ 797. **Compared with Ordinary Divorce Suit.** — Among the differences between the nullity suit and the ordinary one for divorce,<sup>2</sup> is that the former is more radical in its consequences. It more deeply affects property, and in most of our States if successful it bastardizes the children. Therefore it has been said to be more highly privileged;<sup>3</sup> and it excites, to even a greater degree, the vigilance and caution of the court.<sup>4</sup> So the parties are held to strict rule in the pleadings and the proofs.<sup>5</sup> Again, —

§ 798. **Recrimination.** — In most forms of the suit, it is of no avail that the defendant is innocent of any intent to do wrong, or that the plaintiff is the more guilty party.<sup>6</sup> Further, —

§ 799. **Right and Discretion compared.** — Where a case is sufficiently made out, the court has no discretion, it must proceed to the sentence.<sup>7</sup> But where a discretionary power is invoked, considerations from the disastrous consequences of the nullity sentence may prevail. Thus, in the ecclesiastical practice, the court would not after hearing rescind a cause to allow the plaintiff to prove the fact of the marriage, if his conduct had not been meritorious.<sup>8</sup>

§ 800. **Witnesses.** — To prove a marriage void by reason that a former husband or wife was living, a party to the former marriage is under the unwritten rules of evidence not a competent witness.<sup>9</sup> The most marked peculiarity of a nullity suit, in our American practice, relates to —

§ 801. *The Jurisdiction of Equity* : —

**Common-law Courts — Ecclesiastical.** — It is explained in the first volume that when our country was settled all matrimonial

<sup>1</sup> Bodkin v. Case, Milward, 355; Walton v. Rider, 1 Lee, 16, 5 Eng. Ec. 289; Hawke v. Corri, 2 Hag. Con. 280.

<sup>2</sup> Ante, § 794.

<sup>3</sup> Butler v. Butler, Milward, 56, 62.

<sup>4</sup> Harford v. Morris, 2 Hag. Con. 423, 4 Eng. Ec. 575; Wright v. Elwood, 1 Curt. Ec. 662, 666; Wright v. Ellwood, 2 Hag. Ec. 598, 4 Eng. Ec. 216; Legge v. Dumbleton, 9 Jur. 144.

<sup>5</sup> Cuno v. Cuno, Law Rep. 2 H. L. Sc. 300; Sickles v. Carson, 11 C. E. Green, 440.

<sup>6</sup> Ante, § 347; McCarthy v. De Caix,

2 Cl. & F. 568, note; Miles v. Chilton, 1 Rob. Ec. 684. And see Vol. I. § 546, 552-554, 722, 755.

<sup>7</sup> Cobbe v. Garston, Milward, 529; Vol. I. § 618.

<sup>8</sup> Nokes v. Milward, 2 Add. Ec. 386, 2 Eng. Ec. 356, 365.

<sup>9</sup> Cobbe v. Garston, Milward, 529; Finn v. Finn, 12 Hun, 339. And see Searle v. Price, 2 Hag. Con. 187, note, 4 Eng. Ec. 524; Little v. Little, 13 Gray, 264; Borradaile v. Borradaile, 1 Edw. Ch. 40.

jurisdiction was in the ecclesiastical courts, which have had no existence in this country, so that substantially our divorce jurisdiction is statutory.<sup>1</sup> Therefore strictly, in the absence of authority from a statute, no common-law court can hear any matrimonial cause.<sup>2</sup> But —

§ 802. **Equity.** — By the nearly unanimous concurrence of judicial decision in our several States, while a court of equity can no more than one of common law dissolve or suspend a valid marriage without the aid of a statute, it has some authority over questions of nullity for original defects. But just as the tribunals are not in harmony as to the power of equity to decree alimony without divorce,<sup>3</sup> so there appear to be some differences as to their nullity authority. The doctrine mainly prevailing is that, —

§ 803. **Fraud, Mistake, Duress, Lunacy.** — Since the status of marriage is conferred by a contract, without which it cannot exist,<sup>4</sup> and since for avoiding contracts equity has jurisdiction over all questions of fraud, mistake, and lunacy, if one of these impediments has entered into a marriage, a court of equity, in the absence of any other jurisdiction, will on due application pronounce it void. Equity in England will not do this; because formerly there was an express jurisdiction in the ecclesiastical courts, and now there is in the Divorce Court. Nor probably would an American court of equity take the jurisdiction where a statute had expressly conferred it on some other tribunal.<sup>5</sup> Illustrations of the equity jurisdiction are where a marriage is solemnized in jest,<sup>6</sup> where it is procured by fraud,<sup>7</sup> and where one of the parties is insane.<sup>8</sup>

§ 804. **Polygamous Marriage.** — It is more difficult to find ground on which to rest a jurisdiction in equity to pronounce void a polygamous marriage, in the absence of something special to the par-

<sup>1</sup> Vol. I. § 121, 128.

<sup>2</sup> And see *Tefft v. Tefft*, 35 Ind. 44; *Peugnet v. Phelps*, 48 Barb. 566.

<sup>3</sup> Vol. I. § 1395-1400.

<sup>4</sup> Vol. I. § 10, 11, 14, 37.

<sup>5</sup> Ante, § 507; *Perry v. Perry*, 2 Paige, 501; *Wightman v. Wightman*, 4 Johns. Ch. 343, 446; *Burtis v. Burtis*, Hopkins, 557, 14 Am. D. 563; *Clark v. Field*, 13 Vt. 460; *Fornhill v. Murray*, 1 Bland, 479, 483; *Helms v. Franciscus*, 2 Bland, 544, 579, 20 Am. D. 402; *Ferlat v. Gojon*, Hopkins, 478, 14 Am. D. 554. And see

*Almond v. Almond*, 4 Rand. 662, 15 Am. D. 781; *Keyes v. Keyes*, 2 Fost. N. H. 553. Query, whether equity can take jurisdiction to declare a marriage null for duress. See *Hulings v. Hulings*, 2 West. Law. Jour. 131. On principle, plainly it can.

<sup>6</sup> *McClurg v. Terry*, 6 C. E. Green, 225.

<sup>7</sup> *Carris v. Carris*, 9 C. E. Green, 516; *Clark v. Field*, 13 Vt. 460.

<sup>8</sup> *Waymire v. Jetmore*, 22 Ohio St. 271.

ticular case. But it has been held that where a woman enters into a marriage void by reason of the man's having a former wife living, she can sue him in equity for the rents, profits, and redelivery to her of the property which he took possession of under the marriage, and in this suit the court will incidentally declare it void.<sup>1</sup> Beyond which, we have some authority for the more general jurisdiction of equity to declare null polygamous marriages.<sup>2</sup> But —

§ 805. **Canonical Impediments — (Impotence).** — Equity has by the unwritten law no jurisdiction over any canonical defect in marriage;<sup>3</sup> as, for example, to declare it void for impotence.<sup>4</sup>

§ 806. **Contrary Doctrine.** — The South Carolina Court has denied this authority of equity, in the absence of other jurisdiction, to declare null a marriage procured by fraud. In the words of Dunkin, Ch.: "The distinction between the authority to declare a marriage null and void, or to grant a divorce, has no sanction either in reason or authority. The same general principle which would authorize courts of equity to declare a contract void for want of consent would require them to interfere in cases of fraud or misrepresentation, and declare the contract no longer obligatory on one party when the other had refused to perform the duties imposed by it. But no court, either in England or in the United States, has ever declared a marriage null and void in its inception, which did not at the same time assume, as a necessary incident, the authority to divorce the parties, in England *a mensa et thoro*, in our sister States *a vinculo*."<sup>5</sup> The weight of this decision in general American law is greatly impaired by this misapprehension of the doctrine elsewhere prevailing, by the failure to distinguish between the canonical defects and those of the civil sort, and by the mistake that there were no contrary authorities.<sup>6</sup>

§ 807. *Statutory Jurisdiction*: —

**Universal.** — It is believed that the statutory jurisdiction for nullity, the same as for dissolution or separation, has now be-

<sup>1</sup> Young v. Naylor, 1 Hill Ch. 383. See McDonald v. Fleming, 12 B. Monr. 285; Uhl v. Uhl, 52 Cal. 250.

<sup>2</sup> Fuller v. Fuller, 33 Kan. 582.

<sup>3</sup> Vol. I. § 265-267. See Bowers v. Bowers, 10 Rich. Eq. 551, 73 Am. D. 99.

<sup>4</sup> Vol. I. § 476, note; Anonymous, 9 C. E. Green, 19.

<sup>5</sup> Mattison v. Mattison, 1 Strob. Eq. 387, 392, 47 Am. D. 541. See Young v. Naylor, 1 Hill Ch. 383; Bowers v. Bowers, 10 Rich. Eq. 551, 73 Am. D. 99.

<sup>6</sup> Delaware. — In Elzey v. Elzey, 1 Houst. 308, 320, the court accept as of course, and without discussion, a doctrine like this of South Carolina.

come nearly universal in our States, thus leaving the foregoing expositions of little practical consequence.

§ 808. "**Divorce.**" — A statute creating a jurisdiction for "divorce" carries with it suits for nullity,<sup>1</sup>—a doctrine before stated in another aspect.<sup>2</sup>

§ 809. *The Doctrine of this Chapter restated.*

Nullity, dissolution, and separation suits differ in their methods but little. And most of the differences are pointed out, in connection with the subjects to which they relate, in other chapters. Where equity has a jurisdiction upon any of the grounds which include marriage, it may exercise it to declare the marriage null. But there is no other divorce authority known to our law except statutory.

<sup>1</sup> Ante, § 473; *Johnson v. Kincade*, 2 Hamaker v. Hamaker, 18 Ill. 137, 65 Am. Ire. Eq. 470; *Scroggins v. Scroggins*, 3 D. 705. See *Finn v. Finn*, 12 Hun, 339. Dev. 535; *Ritter v. Ritter*, 5 Blackf. 81;      <sup>2</sup> Ante, § 786.

## CHAPTER XXV.

## THE ORDINARY COSTS OF SUIT.

§ 810. **Common Law — Statutes — (Meanings of Terms).** — Suit-money, to be considered in a chapter further on,<sup>1</sup> the doctrines whereof came to us through the ecclesiastical law, is called in England costs. But costs in the ordinary American sense and that of this chapter are unknown to the ancient common law of England, and are with us almost entirely statutory.<sup>2</sup> As such,<sup>3</sup> and with respect of the divorce suit, they will be briefly explained in this chapter.

§ 811. **The Common Course** — of the courts, permitted or required by our statutes, is to give the prevailing party in a common-law suit his taxable costs, not in full return for the money he had paid out, but in refund of certain always necessary expenses. In equity, this rule is less universal, but it is the ordinary one.

§ 812. **Between Husband and Wife** — the unwritten law has established an identity, such that their capacity to sue each other is quite limited. But sometimes litigation may be carried on between them in equity.<sup>4</sup> And another exception is the divorce suit; the rule for which is that when for the redress of a matrimonial wrong the law permits the one to sue the other, it gives them, as a necessary incident, separate existences in respect to all those things which may be deemed parts of the suit.<sup>5</sup> Hence, —

§ 813. **Costs taxed in Divorce Suit.** — In the divorce suit, the same as in any other, there may be between husband and wife taxable costs in the American sense just explained.<sup>6</sup> But in some

<sup>1</sup> Post, c. 30.

<sup>2</sup> 1 Bishop Crim. Proced. § 1313.

<sup>3</sup> Apperson v. Mutual Benefit Life Ins. Co. 9 Vroom, 388; Tallassee Manuf. Co. v. Glenn, 50 Ala. 489.

<sup>4</sup> 1 Bishop Mar. Women, § 35-44, 90, 637-644.

<sup>5</sup> Ante, § 55, note, 116, 120.

<sup>6</sup> Welch v. Welch, 33 Wis. 534; Williamson v. Williamson, 1 Johns. Ch. 488;

of the States it is the practice not to award them, the suit-money being made fully to occupy their place.<sup>1</sup> In some, they are given or withheld at the judicial discretion.<sup>2</sup> More minutely, —

§ 814. **In Favor of the Wife**, — costs may be taxed in a divorce suit.<sup>3</sup> And this rule extends to collateral proceedings; as, if she prevails on her application for an increase of alimony, she may have a judgment against her husband for her costs therein.<sup>4</sup> Equally, —

§ 815. **In Favor of Husband**. — There is no reason growing out of the identity of the parties why a husband prevailing should not have his costs against the wife. But because commonly the property is in his hands, and perhaps for some other reasons also, the court will not ordinarily, if it has a discretion, decree costs against a defeated wife.<sup>5</sup> Still, —

§ 816. **Statutory Terms, &c.** — (Illustrations). — This entire question depends much upon varying terms of the statutes of the different States, and upon particular usage. Where, in Upper Canada, a wife failed in her alimony suit, the husband was required to pay the costs.<sup>6</sup> It was observed in Alabama that it is manifestly improper under any circumstances to render a decree for costs against a wife; and, the learned judge added, "In this case, the court is of opinion that he should have been compelled by the decree to pay the same, as from the admissions of the answer it appears that she had probable cause for instituting her proceedings, although she may not have been able to prosecute the case to successful issue." The further observation was made that independently of the husband's admissions in his answer, she might have had a decree against him for costs, though she failed in her suit.<sup>7</sup> In Pennsylvania, a prevailing husband

*Black v. Black*, 5 Mont. 15; *Lowell v. Lowell*, 55 Cal. 316, and cases in the following notes.

<sup>1</sup> *Whipp v. Whipp*, 54 N. H. 580.

<sup>2</sup> *Soper v. Soper*, 29 Mich. 305; *Cox v. Cox*, 35 Mich. 461, 463; *Lapham v. Lapham*, 40 Mich. 527.

<sup>3</sup> *Symons v. Symons*, 2 Swab. & T. 435; *Thornberry v. Thornberry*, 2 J. J. Mar. 322; *Kendall v. Kendall*, 1 Barb. Ch. 610; *Graves v. Graves*, 2 Paige, 62; *Germond v. Germond*, 1 Paige, 83; *Stevens v. Stevens*, 1 Met. 279; *Kaye v. Kaye*, 4 Swab. & T. 239; *Thorndike v. Thorndike*, 1 Wash. 175.

<sup>4</sup> *Bursler v. Bursler*, 5 Pick. 427.

<sup>5</sup> *De Rose v. De Rose*, Hopkins, 100; *Finley v. Finley*, 9 Dana, 52, 33 Am. D. 528; *Word v. Word*, 29 Ga. 281; *Wood v. Wood*, 2 Paige, 454; *Reavis v. Reavis*, 1 Scam. 242; *Richardson v. Richardson*, 4 Port. 467, 30 Am. D. 538; *Thatcher v. Thatcher*, 17 Ill. 66, 67. See post, § 818.

<sup>6</sup> *McKay v. McKay*, 6 Grant, U. C. Ch. 380.

<sup>7</sup> *Richardson v. Richardson*, 4 Port. 467, 478, 479, 30 Am. D. 538, opinion by Goldthwaite, J.

cannot, it has been held, be made to pay costs to his wife. "Costs," said Strong, J., "are of statutory origin. The Act of 1815, in its twelfth section, enacts that the court may award costs to the party in whose behalf the decree or sentence (that is, of divorce) shall pass, or that each party shall pay his or her own costs; but the act does not authorize the imposition of all the costs upon the successful party."<sup>1</sup> And such would seem to be the law also under the Kentucky statutes.<sup>2</sup>

§ 817. **Wife's Next Friend.** — The rule of forbearing to decree costs against a defeated wife is not applied so strictly to her next friend, when she sues or defends by such. Against him, they will not unfrequently be rendered.<sup>3</sup> Even —

§ 818. **Against the Wife,** — in some circumstances and in some of the States, there may be a decree in a divorce suit for costs,<sup>4</sup> or for such to be paid out of her separate estate.<sup>5</sup>

§ 819. **Enforcing Payment.** — The decree for costs may be enforced by an attachment for contempt,<sup>6</sup> by an execution, or otherwise according to the direction of a statute or the practice of the court. And an action may be maintained on a foreign judgment for costs rendered in a divorce suit.<sup>7</sup>

### § 820. *The Doctrine of this Chapter restated.*

Costs, as distinguished from suit-money, are a creation of statutes; on which, on their interpretations, and on the practice of the particular court, they entirely depend. The practice and the statutes differ in our States. Therefore there can be and is no unvarying judicial doctrine relating to them in our American divorce law.

<sup>1</sup> Shoop's Appeal, 34 Pa. 233, 235.

<sup>2</sup> Nikirk v. Nikirk, 3 Met. Ky. 432. And see Dugan v. Dugan, 1 Duv. 289. As to Connecticut, see Warren v. Clemence, 44 Conn. 308.

<sup>3</sup> Mosser v. Mosser, 29 Ala. 313; Cornelius v. Cornelius, 31 Ala. 479; Ward v. Ward, 2 Dev. Eq. 553; Hughes v. Hughes, 44 Ala. 698; Lawrence v. Lawrence, 3 Paige, 267; Jones v. Jones, 2 Barb. Ch.

146. See Jones v. Fawcett, 2 Phillips, 278.

<sup>4</sup> Eldred v. Eldred, 2 Curt. Ec. 376, 7 Eng. Ec. 144; Errissman v. Errissman, 25 Ill. 136; Decamp v. Decamp, 1 Green Ch. 294. And see Miller v. Miller, Law Rep. 2 P. & M. 13.

<sup>5</sup> Balkum v. Kellum, 83 Ala. 449.

<sup>6</sup> Cockefair v. Cockefair, 23 Abb. N. Cas. 219.

<sup>7</sup> Russell v. Smyth, 9 M. & W. 810.



## BOOK XI.

ANCILLARY PROCEEDINGS RELATING TO THE WIFE'S  
MAINTENANCE, THE PROPERTY, AND CHILDREN.

## CHAPTER XXVI.

## IN GENERAL OF THE SUBJECT.

§ 821. In this Chapter, — following the lead of the principles rather than of the decisions or the reasonings of particular judges, we shall take a general view of the broader subject which, divided into chapters, constitutes the present Book.

§ 822. **Exceptional Nature of Divorce Suit.** — In nearly all litigation except divorce, the thing complained of is a completed breach of duty or of contract, the damage for which is once for all repaired by the payment of a sum of money, or by the doing of something else which the decree of the court specifies. And it is the same of the divorce suit as it affects the marriage status, and in respect of property in possession or action. But marriage carries with it mutual rights and duties, which end only with the life of one of the parties; for example, the husband is to maintain the wife according to his ability and social standing. These are things subject to changes which no court can foresee, and which no judicial decree can anticipate and provide for. And similar rights and duties attach to the married parties and their children in respect of the custody and support of the latter. The result of all which is that a divorce suit, other than the suit for nullity,<sup>1</sup> can accomplish its true end only by remaining perpetually open, to the extent of receiving applications for such variations of the sen-

<sup>1</sup> Ante, § 472, 473.

tence from time to time as the changed circumstances of the parties and their children require. Hence, —

§ 823. **Necessity for Ancillary Proceedings.** — As to what depends on the shifting conditions of the parties and their children, the decree for divorce must be subject to perpetual alterations. True, without this peculiarity, it might produce its one rough effect, but it could not satisfy the nice demands of an exact justice. Therefore the great law of necessity,<sup>1</sup> which carries with it a remedy for every right conferred by a statute<sup>2</sup> or by unwritten rule, gives the ancillary proceeding to the extent and in the circumstances thus indicated. Beyond which, —

§ 824. **Convenience.** — In the nature of the divorce suit, it does not extend as of course beyond the ascertainment, the annulling, or the modifying, as the particular case may require, of the marriage status. We have in various connections had occasion to see that attendant or consequential property rights and interests are a different thing.<sup>3</sup> And different also are questions of the custody and support of children. Therefore and for a variety of practical reasons it is convenient, though neither necessary nor always practised, to relegate this collateral litigation concerning property rights, the custody and support of children, the maintenance of the wife, the compelling of the husband to supply her with suit-money, and other like things, to the class termed ancillary, instead of making it an inseparable part of the main suit. Now, —

§ 825. **The Following Chapters,** — comprehending the present Book, will explain these matters in detail and upon the authorities. For on the whole the utterances and adjudications of the courts fairly well accord with these teachings of reason. But sometimes the tribunal, not mindful of this larger view of the subject, and seeking analogies from those common causes which in their nature require only a single complaint, and are satisfied by a single judgment, excludes the ancillary proceeding without which the justice it administers becomes imperfect.

### § 826. *The Doctrine of this Chapter restated.*

Judicial proceedings, while under the guidance of wise and thoughtful judges, are so shaped as to terminate in the law's ex-

<sup>1</sup> Ante, § 298.

<sup>2</sup> Ante, § 116, note.

<sup>3</sup> For example, Vol. I. § 15, 1463-1470; ante, § 23, 27, 32, 35, 67, 77-81.

act and complete justice. The divorce suit, when contemplated as a means to this end, is seen to have a unity and scope which comprehend what pertains to the marriage status; outside whereof it permits such ancillary and supplemental proceedings as may reasonably fulfil justice with respect to the maintenance of the wife, to money for carrying on or defending the suit, to dividing the property of the parties, to the custody and support of the children, and to varying from time to time by supplemental orders the prior judicial determinations as the changed conditions of the parties and their children require. Partly to repeat, an ordinary suit, in a court either of law or of equity, fulfils its mission by a single judgment. So may a divorce suit as respects the status of the parties. But as respects the maintenance of the wife, the custody of children, and their support, it can in its nature terminate only with the death of the former or the majority of the latter.

## CHAPTER XXVII.

## THE NATURE AND SORTS OF ALIMONY.

§ 827. Introduction.

828-838. General View.

839-851. Otherwise than in Divorce Suit.

852-886. In Divorce Suit.

887. Doctrine of Chapter restated.

§ 827. **How Chapter divided.**— We shall divide this subject into, I. A General View of Alimony and its Varying Sorts; II. Alimony otherwise than in the Divorce Suit; III. Alimony in the Divorce Suit.

*I. A General View of Alimony and its Varying Sorts.*

§ 828. **Already,**— in the first volume,<sup>1</sup> we have considered the alimony which in a few of our States is decreed by equity, not as an appendage to a divorce suit, but in a proceeding instituted for the express purpose. And there we saw something of the more general nature of alimony and how it is defined.<sup>2</sup> Looking at the question as unaffected by modern statutes, —

§ 829. **Whence the Doctrine — (Property — Support of Wife).**— The doctrine of alimony is the necessary consequence of what the unwritten law establishes between husband and wife as to property. We have in recent years modifying statutes, but not of a sort to work any radical change in the doctrine we are here considering. By the unwritten law, marriage invests the husband with all the wife's available means of support, with the ownership of her future earnings, and with the right to appropriate to himself her acquisitions. In return for which,<sup>3</sup> it casts on him the

<sup>1</sup> Vol. I. § 1383-1421.

<sup>2</sup> *Ib.* § 1385-1392; *Taylor v. Taylor*, 93 N. C. 418, 53 Am. R. 460.

<sup>3</sup> Story observes that only in respect of the husband's duty to maintain his wife, does the law give him her fortune. 2

duty, not in any considerable degree taken away by the modern statutes,<sup>1</sup> suitably to maintain her, according to his ability and condition in life.<sup>2</sup> No corresponding duty is laid upon her as to him, even though she has a separate estate and he is destitute.<sup>3</sup> Yet where he has neither means nor ability to earn money, it may perhaps, or according to some opinions, legally devolve on her to support herself through her personal capacity and separate funds;<sup>4</sup> for it is not presumable the public would maintain her in idleness, leaving means of her own untouched. The husband cannot abandon his obligations to his wife; therefore, where in any case the law authorizes her to live apart from him by reason of his ill conduct, it consequently requires him to maintain her while so living.<sup>5</sup> Hence, —

§ 830. **Alimony and Sentence to Separation.** — A decree for separation in favor of the wife, where the funds which in cohabitation should support the husband and her are vested in him, must, if so she prays, be attended by a decree for alimony.<sup>6</sup> But, —

§ 831. **Wife having Funds.** — Where, in consequence of a settlement or otherwise, the wife's property has been kept in her hands,

Story Eq. Jur. § 1419. Yet this duty is not impaired by his receiving no fortune with her, or by an antenuptial contract wherein each releases to the other all property rights accruing from the marriage. Even in such a case the husband must on divorce aliment the wife unless her separate estate is sufficient. Logan v. Logan, 2 B. Monr. 142, 149.

<sup>1</sup> Vol. I. § 1184, 1185.

<sup>2</sup> Miller v. Miller, Saxton, 386; 2 Story Eq. Jurisp. § 1424; Neil v. Johnson, 11 Ala. 615. And see Vol. I. § 1187 et seq.; 1 Bishop Mar. Women, § 887.

<sup>3</sup> Methodist Church v. Jaques, 1 Johns. Ch. 450. See Vol. I. § 1184.

<sup>4</sup> Wyly v. Collins, 9 Ga. 223. See Vol. I. § 1801; 1 Bishop Mar. Women, § 894. "Nor had he a right to say that she should earn all she could by her labor, and he would only be answerable for the difference between her earnings and the amount of the expense necessary for her support. Such is not the law of husband and wife. The husband must support his wife himself, or pay those who do support her, in a reasonable manner." Cunningham v. Irwin, 7 S. & R. 247, 260, 10 Am. D. 458. It seems to me that this state-

ment of the law is not precisely accurate. The husband may require his wife to contribute by her exertions to the common benefit, according to his pecuniary condition, station, and the customs of the society in which the parties move; but when she has done this, her earnings are in law his property, and from the fund which they have thus helped to establish he is bound, therefore, not to aid in her support, but to support her. And see Hoffman v. Hoffman, 7 Rob. N. Y. 474; Brown v. Brown, 22 Mich. 242; Ressor v. Ressor, 82 Ill. 442; Gardner v. Gardner, 54 Ga. 560; Prince v. Prince, 1 Rich. Eq. 282; Callahan v. Patterson, 4 Tex. 61, 66, 51 Am. D. 712.

<sup>5</sup> Barker v. Dayton, 28 Wis. 367; Harris v. Harris, 31 Grat. 13; York v. York, 34 Iowa, 530; The City v. Thiele, 10 Philad. 205; Thomas v. Thomas, 41 Wis. 229.

<sup>6</sup> See Frankfort v. Frankfort, 4 Notes Cas. 280, 282; Moon v. Baum, 58 Ind. 194; Thomas v. Thomas, 5 C. E. Green, 97; Sidney v. Sidney, Law Rep. 1 P. & M. 78; Everett v. Everett, 52 Cal. 383; Poynter Mar. & Div. 259.

and has not vested in the husband, and it is fully equal to what she can justly demand from the common fund, the reason for allowing her this support fails, and she is not entitled to it. If her estate is partly adequate, it goes so far to reduce her claim.<sup>1</sup> Or —

§ 832. **Husband having provided.** — If the husband has voluntarily conveyed to the wife property equivalent to what the law entitles her to, she cannot demand alimony.<sup>2</sup> And whatever his provision for her separate maintenance, she can have nothing further if it is adequate, otherwise she may have such alimony as will make up the deficiency.<sup>3</sup> As to —

§ 833. **Third Person providing.** — It would in reason seem possible for a third person to settle property on a married woman in a way to make it a special provision over and above, and added to, what the law permits her to claim of her husband; so that it should not be taken into the account in estimating her alimony. Assuming this to be so, the intent of the donor may be as well implied as expressed in words. There is an English case which, if we accept it as sound, probably rests on this principle. The court declined to deduct, from the amount otherwise allowable for alimony, money left by wills since the marriage to the wife for her separate use. It also refused to make any deduction on account of her salary of £500 a year as a lady-in-waiting to the queen. But this was because the salary was not permanent as a source of income,<sup>4</sup> and because it no more than covered the expenses which the office entailed upon the possessor. Yet the Privy Council, overruling the Arches Court, did allow a deduction in respect of a pension of £400 a year, which, while the suit was pending, the king had granted the wife.<sup>5</sup>

§ 834. **Continuous Allowance.** — Though the provision of a settlement, or of property conveyed directly to the wife, may thus in part or fully supersede her claim upon the husband, this is not

<sup>1</sup> *Street v. Street*, 2 Add. Ec. 1, 2 Eng. Ec. 195; *Whispell v. Whispell*, 4 Barb. 217; *Otway v. Otway* 2 Phillim. 109, 1 Eng. Ec. 203; *Logan v. Logan*, 2 B. Monr. 142; *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178, *Holmes v. Holmes*, 4 Barb. 295; *Wright v. Wright*, 6 Tex. 29; *Methvin v. Methvin*, 15 Ga. 97, 60 Am. D. 664. And see *Dixon v. Hurrell*, 8 Car. & P. 717; *Middleton v. Middleton*, 18 Bradw. 472.

<sup>2</sup> *Harrison v. Harrison*, 49 Mich. 240;

*Stevens v. Stevens*, 49 Mich. 504; *Corey v. Corey*, 81 Ind. 469.

<sup>3</sup> *Gaines v. Gaines*, 9 B. Monr. 295, 48 Am. D. 425; *Rose v. Rose*, 11 Paige, 166. And see *Coles v. Coles*, 2 Md. Ch. 341; *Brown v. Brown*, 2 Md. Ch. 316.

<sup>4</sup> See *Haviland v. Haviland*, 3 Swab. & T. 114.

<sup>5</sup> *Westmeath v. Westmeath*, 3 Knapp, 42. See *Holmes v. Holmes*, 4 Barb. 295; *Thompson v. Hervey*, 4 Bur. 2177.

the law's form of his duty to support her. It is to supply her continuous wants as they arise from day to day. So that when he is delinquent, in consideration whereof the law gives her alimony, it is not a gross sum, or a specific part of the husband's estate *in specie*, but it is a continuous allotment of sums payable at regular periods for her support from year to year.<sup>1</sup> Hence, —

§ 835. **In Gross — (Part of Husband's Estate).** — The court cannot decree to the wife, as alimony, a gross sum, an absolute title in specific property, or a sale of a part of the husband's estate for her use.<sup>2</sup> But we have statutes, to be explained in future chapters, allowing this sort of provision, and sometimes it is termed alimony. So —

§ 836. **During Life — Death — "Joint Lives" — (Form of Decree).** — By the unwritten rule, alimony cannot be ordered for the term of the wife's life,<sup>3</sup> so, whatever the form of the decree, it ends when the husband dies ;<sup>4</sup> because it is a maintenance to her,<sup>5</sup> while his duty to maintain her ceases at his death. Therefore the expression in the decree for alimony on the divorce from bed and board should be that it continue during the joint lives of the parties,<sup>6</sup> or until reconciliation and recohabitation. But for the wife's security against a husband who to frustrate the decree might entice her into a momentary reunion and then expel her or return to his wrongful conduct, it is by some courts deemed better, and not inconsistent with this general doctrine, for the decree to state that the alimony shall continue during the joint lives of the parties, — the court reserving the right to change the allowance from time

<sup>1</sup> *De Blaquiere v. De Blaquiere*, 3 Hag. Ec. 322, 5 Eng. Ec. 126; *Wilson v. Wilson*, 3 Hag. Ec. 329, note, 5 Eng. Ec. 129; *Hyde v. Hyde*, 4 Swab. & T. 80; *Campbell v. Campbell*, 37 Wis. 206; *Russell v. Russell*, 4 Greene, Iowa, 26, 61 Am. D. 112; *Brown v. Brown*, 38 Ark. 324; *Lennahan v. O'Keefe*, 107 Ill. 620.

<sup>2</sup> *Maguire v. Maguire*, 7 Dana, 181; *Wallingsford v. Wallingsford*, 6 Har. & J. 485; *Purcell v. Purcell*, 4 Hen. & Munf. 507; *Almond v. Almond*, 4 Rand. 662, 15 Am. D. 781; *Lockridge v. Lockridge*, 3 Dana, 28, 28 Am. D. 52; *Russell v. Russell*, 4 Greene, Iowa, 26; *Phelan v. Phelan*, 12 Fla. 449; *Hyde v. Hyde*, 4 Swab. & T. 80; *Crain v. Cavana*, 62 Barb. 109; *Crain v. Cavana*, 36 Barb. 410; *Calame v. Calame*, 10 C. E. Green, 548, 9

C. E. Green, 440; *Doole v. Doole*, 144 Mass. 278. But there are States in which by statute alimony may be awarded in gross. *Taylor v. Gladwin*, 40 Mich. 232.

<sup>3</sup> *Lockridge v. Lockridge*, 3 Dana, 28, 28 Am. D. 52; *Deweese v. Dewees*, 55 Missis. 315. And see *Casteel v. Casteel*, 38 Ark. 477; *Rogers v. Vines*, 6 Ire. 293; *Storey v. Storey*, 23 Ill. Ap. 558.

<sup>4</sup> *Field v. Field*, 15 Abb. N. Cas. 434, 66 How. Pr. 346. But there are forms of the statute under which alimony may continue during the life of the wife, though the husband is dead. Yet unless the decree is distinct to this effect it will not be so construed. *Lennahan v. O'Keefe*, 107 Ill. 620. See post, § 858.

<sup>5</sup> Ante, § 829.

<sup>6</sup> *Kurtz v. Kurtz*, 38 Ark. 119.

to time according to circumstances, and requiring security for its payment.<sup>1</sup> But the practice is not uniform in our tribunals,<sup>2</sup>—matter for a chapter further on.<sup>3</sup> Hence,—

§ 837. "**Debt**"—(**Bankruptcy**).—Though the husband's liability to pay alimony is distinctly recognized in the law, and is enforceable against him and his property,<sup>4</sup> it is not a "debt."<sup>5</sup> Therefore the decree for it is not commonly within the discharge in bankruptcy.<sup>6</sup>

§ 838. **As Protection to Husband against Wife's Debts.**—We have seen that when a husband voluntarily provides necessaries for his wife, or when otherwise she is in possession of the means to pay for them, the provision or means being adequate, he is not answerable to a third person for necessaries supplied her on his account. But he is answerable when an adequate allowance is not paid.<sup>7</sup> So likewise if a wife has, from whatever source, an income yielding her what alimony would give, she is not entitled also to the alimony.<sup>8</sup> As a provision for the wife, alimony judicially decreed is within this principle; if regularly paid, it protects the husband against her debts, and the further effect of the decree is to render it conclusively sufficient in amount.<sup>9</sup> And this doctrine extends even to the mere order of the court for temporary alimony during the pendency of a divorce suit,—it matters not to the husband's protection whether in fact the amount was adequate to the wife's needs or not.<sup>10</sup> If it is not paid, the order will furnish him no protection.<sup>11</sup> And where, in consequence

<sup>1</sup> *Lockridge v. Lockridge*, 3 Dana, 28, 28 Am. D. 52; *Logan v. Logan*, 2 B. Monr. 142; *Mayhugh v. Mayhugh*, 7 B. Monr. 424; *Paff v. Paff*, Hopkins, 584.

<sup>2</sup> *Burr v. Burr*, 7 Hill, N. Y. 207.

<sup>3</sup> Post, c. 34.

<sup>4</sup> *Daniels v. Lindley*, 44 Iowa, 567; *Preston v. Williams*, 81 Ill. 176; *Burrows v. Purple*, 107 Mass. 428.

<sup>5</sup> *Pain v. Pain*, 80 N. C. 322; *Menzie v. Anderson*, 65 Ind. 239; *Picket v. Garrison*, 76 Iowa, 347, 14 Am. St. 220; *Linton v. Linton*, 15 Q. B. D. 239. But see *Chase v. Chase*, 105 Mass. 385.

<sup>6</sup> *Linton v. Linton*, supra; *In re Henderson*, 20 Q. B. D. 509. But see *Beach v. Beach*, 29 Hun, 181.

<sup>7</sup> Vol. I. § 1188, 1205, 1236–1239, 1249, 1285, 1301; *Hodgkinson v. Fletcher*, 4 Camp. 70; *Willson v. Smyth*, 1 B. & Ad.

801; *Baker v. Barney*, 8 Johns. 72, 5 Am. D. 326; *Fenner v. Lewis*, 10 Johns. 38.

<sup>8</sup> Ante, § 831–833.

<sup>9</sup> *Hare v. Gibson*, 32 Ohio St. 33, 30 Am. R. 568; *Crittenden v. Schermerhorn*, 39 Mich. 661, 33 Am. R. 440.

<sup>10</sup> *Willson v. Smyth*, 1 B. & Ad. 801; *Bennett v. O'Fallon*, 2 Misso. 69, 22 Am. D. 440; *Crittenden v. Schermerhorn*, 39 Mich. 661, 33 Am. R. 440; *Hare v. Gibson*, 32 Ohio St. 33, 30 Am. R. 568; *Gordon v. Sempill*, Mor. Dict. 1 App. (H. & W. No. 4) 10.

<sup>11</sup> *Hunt v. De Blaquiere*, 5 Bing. 550; *Keegan v. Smith*, 5 B. & C. 375. The same rule applies where an allowance made in a deed of separation is not paid. *Nurse v. Craig*, 2 New Rep. 148; *Burrett v. Booty*, 8 Taunt. 343; *Miller v. Miller*, Saxton, 386, 392.



of his neglect to pay, he has been compelled to discharge debts contracted by her, his only remedy is to apply for a reduction of the alimony.<sup>1</sup>

## II. *Alimony otherwise than in the Divorce Suit.*

§ 839. **Appendage.**—We saw in the first volume that by the more approved doctrine, dissented from by some of our courts, the alimony of the unwritten law is always a mere appendage to a suit for something else, never an independent right.<sup>2</sup> Now,—

§ 840. **After Divorce decreed.**—It is not contrary to this better doctrine to hold that alimony may be granted after a decree for divorce has been made, and the term of the court has closed. For we saw in the last chapter that divorce litigation is in its nature exceptional, rendering it, as to alimony, or the support of the wife, never at an end during the joint lives of the parties.<sup>3</sup> And such was the law which travelled to this country from England, to become common law here. For the course in the ecclesiastical courts, followed afterward by the Divorce Court, was, not only to receive applications to vary the alimony at times and terms of the court however remote after the granting of the divorce,<sup>4</sup> but if the question of alimony was not passed upon before the divorce sentence was entered and the court adjourned, to entertain in the same cause an original petition for it at any subsequent time or term.<sup>5</sup> In accordance with which view, it has been in some of our courts laid down that though the common practice is to ask for divorce and alimony in one bill, and have an award of both at one time, a party need not proceed thus; but if the question of alimony is not determined in the divorce suit, the wife may afterward sue for it by separate bill, either in the same court or any other of competent jurisdiction.<sup>6</sup> On the other hand, we have in various States statutes which are con-

<sup>1</sup> *De Blaquiere v. De Blaquiere*, 3 Hag. Ec. 322, 5 Eng. Ec. 126, 128. And see *Hancock v. Merrick*, 10 Cush. 41.

<sup>2</sup> Vol. I. § 1388, 1393-1401; *Clark v. Clark*, 78 Ga. 79.

<sup>3</sup> Ante, § 822-824.

<sup>4</sup> Post, § 869-881.

<sup>5</sup> *Covell v. Covell*, Law Rep. 2 P. & M. 411; *Westmeath v. Westmeath*, 3 Knapp,

42, and *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178, cited in this case.

<sup>6</sup> *Shotwell v. Shotwell*, Sm. & M. Ch. 51; *Lawson v. Shotwell*, 27 Missis. 630, 635; *Crugom v. Crugom*, 64 Wis. 253. And see *Lyon v. Lyon*, 21 Conn. 185; *McKarracher v. McKarracher*, 3 Yeates, 56; *Jordan v. Jordan*, 53 Mich. 550; *Ellis v. Ellis*, 13 Neb. 91.

strued to exclude this practice, or adverse renderings of the unwritten law.<sup>1</sup> Thus, —

§ 841. **All in One Suit — Dividing Remedy.** — There is, governing the ordinary procedure of our courts, a rule in terms not well defined, to the effect that a person injured by one wrong cannot cut his redress into parts, and sue for one part to-day and for another to-morrow, whether in the same or different tribunals. Are divorce and alimony inseparable within this rule? We have just seen that they were not in England when we received thence our unwritten law, and not all deem them so with us. But the Indiana Court maintained that it could not take jurisdiction to give a wife divorced in Kentucky alimony out of the husband's lands in Indiana, or make a division of them in her favor, though on pronouncing the divorce the Kentucky Court<sup>2</sup> had held that it was not authorized to consider them in assigning to her a share of the property, — a conclusion from which, as to the authority of the Kentucky Court, the Indiana judges dissented.<sup>3</sup> Therefore, thus dissenting, they held that the party having had the right to litigate the question in the Kentucky suit could not bring it forward in the Indiana. The reader will perceive that we have here an Indiana tribunal overruling the Kentucky one upon a question of Kentucky law. Contrary to which, the established doctrine gives to the laws of a foreign country the interpretation which they have received at home.<sup>4</sup> But for this oversight, not improbably the decision would have been the other way. On the whole, —

§ 842. **Diverse Opinions and Statutes** — on this question prevail in our States. So that in some of them — for further example, in Ohio<sup>5</sup> — the jurisdiction to award alimony after a suit or divorce in another State or country exists, in others it does not.<sup>6</sup> But —

§ 843. **Dissolution distinguished from Separation.** — There is a distinction, not in all the cases present to the judicial thought,<sup>7</sup>

<sup>1</sup> Johnson v. Johnson, 12 Daly, 232; Cullen v. Cullen, 55 N. Y. Super. 346; Erkenbrach v. Erkenbrach, 12 Daly, 258, 63 How. Pr. 194, 96 N. Y. 456.

<sup>2</sup> Fishli v. Fishli, 2 Litt. 337.

<sup>3</sup> Fischli v. Fischli, 1 Blackf. 360, 12 Am. D. 251. But see Crane v. Meginnis, 1 Gill & J. 463, 19 Am. D. 237. See Wilde v. Wilde, 36 Iowa, 319.

<sup>4</sup> Vol. I. § 1076, 1077, 1079, 1101, 1108, 1111, 1126.

<sup>5</sup> D'Arusmont v. D'Arusmont, 14 Law Reporter, 311, 8 West. Law Jour. 548; Cox v. Cox, 20 Ohio St. 439; Woods v. Waddle, 44 Ohio St. 449.

<sup>6</sup> Cases cited to the last two sections; Van Orsdal v. Van Orsdal, 67 Iowa, 35.

<sup>7</sup> Ante, § 28, 110.

between the alimony of the unwritten law, which exists only where there is a subsisting marriage,<sup>1</sup> and the alimony which our statutes permit on a decree for dissolution. The former is the sort contemplated in the foregoing sections of this sub-title. The latter<sup>2</sup> cannot be awarded without authority from a statute.<sup>3</sup> Yet statutes in all our States provide in various terms for it, and it may be an interesting question whether or not particular ones extend to the —

§ 844. **Ex Parte Divorce.** — We have seen that a non-domiciled husband against whom his wife has obtained an *ex parte* divorce, he not having received actual notice within the State, and not having appeared, cannot be subjected to a decree for alimony.<sup>4</sup> But the *ex parte* divorce is always a dissolution,<sup>5</sup> there being no practical occasion for an *ex parte* separation from bed and board, wherein the decree for alimony is impossible. Hereupon, should the statutes create in the divorced husband a general duty to support his late wife, doubtless she might apply with effect to the proper court for alimony from the man from whom she had obtained such dissolution, in the State of his jurisdiction,<sup>6</sup> or on finding him within her own. On the other hand, the statute might be in terms to exclude this right. It would not be compensatory to collate here the words from the different States, and speculate upon their several interpretations. In sound legislation, all ought to be in some form to carry this jurisdiction. And there are States wherein, under decisions already rendered, the courts will interpose, deriving their authority either from interpretations of the unwritten law, or from statutes combining with it. Thus, in Ohio, a husband having obtained in another State an *ex parte* divorce from his wife domiciled in Ohio, it was held to be no defence to her suit for alimony; for it operated only on the marriage status, and did not settle property rights, of which alimony is one. “In arriving at this conclusion,” said White, J., “we make no distinction between a decree rendered, under the circumstances of this case, in a foreign, and one rendered in a domestic forum. In either case, to give to a decree thus obtained the effect claimed for it would be to allow it to work a fraud upon the

<sup>1</sup> Post, § 854.

<sup>2</sup> Post, § 857.

<sup>3</sup> *Wilde v. Wilde*, 36 Iowa, 319.

<sup>4</sup> Ante, § 27, 35, 36, 79.

<sup>5</sup> Ante, § 131–158.

<sup>6</sup> At least, if the statutes of both States had the provision. *Bishop Non-Con. Law*, § 1281.

pecuniary rights of the wife.”<sup>1</sup> Under this head we have the following —

§ 845. **Unique Case.** — Alabama (should this matter be deemed important) is one of the States in which equity will decree alimony without divorce.<sup>2</sup> A husband removed thence without his wife to Indiana. Under the law of the latter State, the applicant for divorce must be domiciled in it a year before the courts can entertain his suit. While his year had not expired, the wife brought her bill in equity against him in Alabama, not for the mere alimony, but for divorce. So the Alabama Court was the first to entertain jurisdiction in the mutual controversy.<sup>3</sup> Next he, on the expiration of his year and unknown to her, brought his divorce suit in Indiana and obtained a decree of dissolution before her bill came to a hearing. On his setting up this Indiana divorce in a supplemental answer, the Alabama Court held it not to bar the wife’s suit; for though if his change of domicil was in good faith and without fraud, the divorce decree had its effect on the status of the marriage, it had none on the Alabama rights of property adjustable in this suit. Said Peters, J.: “The Indiana divorce . . . may protect him upon a charge of bigamy, should he marry again in this State.<sup>4</sup> But without stopping to inquire whether it was obtained by him by fraud, and therefore is vicious on that account or not, it certainly cannot affect the rights of the complainant, except her right in the husband as husband. If it is valid, it unmarries him and sets him free from his marital vows to her. He is no longer the complainant’s husband. But it does not settle her right to alimony; it does not settle her right to dower in his lands, and her statutory right to distribution of his property in this State, in the event she should survive him, nor any other interest of a pecuniary character she may have against him.”<sup>5</sup>

<sup>1</sup> *Cox v. Cox*, 19 Ohio St. 502, 512, 2 Am. R. 415, 20 Ohio St. 439. And see *Stilphen v. Stilphen*, 58 Me. 508, 4 Am. R. 305; *Nichols v. Nichols*, 10 C. E. Green, 60; *Wright v. Wright*, 24 Mich. 180.

<sup>2</sup> Vol. I. § 1398.

<sup>3</sup> Vol. I. § 1448, 1460, 1461; *Haines v. Carpenter*, 1 Woods, 262. And see *Kittle v. Kittle*, 8 Daly, 72.

<sup>4</sup> Referring to *Thompson v. S.* 28 Ala.

<sup>5</sup> *Turner v. Turner*, 44 Ala. 437, 450, referring to *Webster v. Reid*, 11 How. U. S. 437, 460; *Nations v. Johnson*, 24 How. U. S. 195, 206; *Boswell v. Otis*, 9 How. U. S. 336, 350; *Mills v. Duryee*, 7 Cranch, 481; *D’Arcy v. Ketchum*, 11 How. U. S. 165, 171, 172; *McElmoyle v. Cohen*, 13 Pet. 312, 330; 2 Am. Lead. Cas. 551; 3 Phil. Ev. C. & H. notes, p. 351, note 636.

§ 846. **After Legislative Divorce.**—A husband in Tennessee obtained from the legislature a special act divorcing him from his wife, with the proviso that it should not deprive her “of her right to alimony, if by law she is entitled to the same.” The general divorce statute had declared it to “be the duty of the court in making up their decree to decree to the wife so divorced such part of the real and personal property as they shall think proper, consistent with the nature of the case.” Thereupon this wife, proceeding by bill for alimony, was permitted to recover it. The general statute gave her, it was deemed, the right to this provision whether she was the innocent or guilty party in the difficulties which led to the divorce. And the court would take up the question where the legislature laid it down, and proceed to the end. The learned tribunal further intimated that its action would have been the same had the divorce bill not contained the clause above quoted; also, that a wife’s right to support from her husband is within constitutional guaranties, not subject to be taken away by a divorce bill, passed, as this was, *ex parte*, and without notice to her, even if effectual as against her to dissolve the marriage.<sup>1</sup>

§ 847. **After Alimony Decree — (Full Faith and Credit).**—A decree for alimony, there being a competent jurisdiction, is a record to which, under the Constitution of the United States, must be given full faith and credit in every other State. The courts of the other State, wherein the decree is relied upon, will accord to it the effect it has under the law of the State of its rendition, not under that of their own State.<sup>2</sup> And it is of no avail to the party objecting that the tribunal asked to enforce it could not make the like decree under like circumstances.<sup>3</sup> But an alimony decree has in most of our States only a sort of interlocutory force, is liable to be varied from time to time by the court which pronounced it, and is enforceable only on process issuing from such court.<sup>4</sup> Yet this peculiarity does not prevent its being a record, therefore in some way it must be given effect in the other State.<sup>5</sup> In reason, the method pertains to the procedure, and the suit upon it should conform to that of the State,

<sup>1</sup> Richardson v. Wilson, 8 Yerg. 67; Vol. I. § 15; ante, § 841.

<sup>2</sup> Ante, § 180–185.

<sup>3</sup> Stewart v. Stewart, 27 W. Va. 167; D. 225.

Rigney v. Rigney, 23 Abb. N. Cas. 212.

<sup>4</sup> See, among other places, post, c. 34. Also post, § 869–881.

<sup>5</sup> Borden v. Fitch, 15 Johns. 121, 8 Am.

not of its rendition, but of its enforcement.<sup>1</sup> And not impossibly, within a principle stated in the first volume,<sup>2</sup> there may be States wherein legislation has provided no remedy adapted to this sort of case; when, from want of domestic authority, the court must decline to execute the superior command, leaving the responsibility with the legislature.<sup>3</sup> Such being the established law, it may be helpful to take a brief view of —

§ 848. **Some of the Cases.** — A Kentucky court, on application from a husband, pronounced the dissolution of his marriage; then he and the late wife became citizens of Ohio, and from the tribunal of the latter State, in a suit which he defended, she had a decree for a portion of his property under the name of alimony; and thereupon the Kentucky Court enforced this decree.<sup>4</sup> In an early Wisconsin case, it was adjudged that an action of debt will not lie upon a decree of divorce from bed and board and alimony, rendered in another State; and by way of *dictum* it was said that the tribunal pronouncing the decree can alone and in its own jurisdiction compel its performance, it not being enforceable in a sister State.<sup>5</sup> This *dictum* was plainly erroneous; so also, if debt was the proper form of action, was the judgment itself. Even without the help of the Constitution of the United States, —

§ 849. **English Decree in Ireland.** — Where, in England, the court pronounced a decree for judicial separation, and thereupon ordered permanent alimony at a fixed quarterly rate until further order, and no further order was made, the Irish Court sustained the wife's suit for alimony in arrear, the husband residing in Ireland.<sup>6</sup>

§ 850. **State Alimony Decree in United States Court.** — By the majority of a divided bench, the United States Supreme Court has held that if, after an alimony decree in a State court on a divorce from bed and board, the husband removes to another State, the wife remaining behind, the proper national tribunal — the parties thus becoming citizens of different States — has a jurisdiction to compel its payment. The wife's complaint was in this case by bill in equity. Said Wayne, J.: "The parties to a cause for a divorce and for alimony are as much bound by a decree for both,

<sup>1</sup> Bishop Con. § 1403 et seq.

<sup>2</sup> Vol. I. § 917.

<sup>3</sup> Bishop Stat. Crimes, § 14.

<sup>4</sup> Rogers v. Rogers, 15 B. Monr. 364.

<sup>5</sup> Barber v. Barber, 1 Chand. 280. And see Morton v. Morton, 4 Cush. 518; Clark v. Clark, 6 Watts & S. 85.

<sup>6</sup> Nunn v. Nunn, 8 Law Rep. Ir. 298.

which has been given by one of our State courts having jurisdiction of the subject-matter and over the parties, as the same parties would be if the decree had been given in the Ecclesiastical Court of England. The decree in both is a judgment of record, and will be received as such by other courts. And such a judgment or decree, rendered in any State of the United States, the court having jurisdiction, will be carried into judgment in any other State, to have there the same binding force that it has in the State in which it was originally given. For such a purpose, both the equity courts of the United States and the same courts of the States have jurisdiction.”<sup>1</sup>

§ 851. **New Proceeding for Divorce.** — Whether alimony has been rendered in a divorce suit or not, if the decree has dissolved the marriage bond, there can be no just ground for a new proceeding for a divorce, whether in the same State or any other, unless a statute has authorized such anomalous suit.<sup>2</sup> But a divorce from bed and board furnishes no obstacle to a dissolution cause. Therefore it was held in a Scotch case, and on appeal confirmed by the House of Lords, that a divorce from bed and board in England, obtained by the wife for the husband’s adultery, was no bar to her proceeding in Scotland for a divorce from the bond of matrimony for the same adultery.<sup>3</sup>

### III. *Alimony in the Divorce Suit.*

§ 852. **Not commonly otherwise.** — With the exceptions already pointed out in this chapter, added to whatever exceptions may be found in the doctrine of alimony without divorce treated of in the first volume,<sup>4</sup> alimony is simply an incident to the divorce suit.<sup>5</sup>

§ 853. **Elsewhere and Here.** — Alimony being both temporary and permanent, the former a special provision for the wife while the suit is pending, and the latter a maintenance for her after it has terminated in her favor, we shall consider the doctrines special to these two sorts in separate chapters. The present sub-

<sup>1</sup> Barber v. Barber, 21 How. U. S. 582, 591. And see Cheever v. Wilson, 9 Wal. 108, 124; Bennett v. Bennett, Deady, 299.

<sup>2</sup> Post, § 857.

<sup>3</sup> Geils v. Dickenson, 20 Eng. L. & Eq. 1, 15 Scotch Sess. Cas. 2d ser. H. of L. 28; s. c. in House of Lords, Geils v. Geils,

1 Macq. Ap. Cas. 255. See Cox v. Cox, 20 Ohio St. 439; Kinnier v. Kinnier, 53 Barb. 454.

<sup>4</sup> Vol. I. § 1383-1421.

<sup>5</sup> Lawson v. Shotwell, 27 Missis. 630; Moon v. Baum, 58 Ind. 194; Ramsden v. Ramsden, 91 N. Y. 281.

title will be given to such expositions as, connected with the first, will show the general nature of alimony at whatever times awarded. Thus,—

§ 854. First. *Marriage and alimony are under the unwritten law inseparable.* To illustrate,—

§ 855. **In Nullity.**—A sentence declaring a marriage void from the beginning, whether originally it was void or voidable, cannot be enlarged or supplemented by a decree for alimony,—it being impossible there should be alimony where there is no marriage.<sup>1</sup> But the statutes in some of the States, to remedy the hardship of the unwritten rule, allow it;<sup>2</sup> the Maine one does not authorize it on a nullity sentence for impotence.<sup>3</sup> Besides which,—

§ 856. **The Ecclesiastical Courts,**—to mollify this hardship, sometimes gave with their nullity decree a specific sum under the name of costs or expenses of the proceeding. In one case, Sir Edward Simpson said: “There being no doubt that a marriage was had freely and voluntarily, and that this affair has been prejudicial to Miss Jones, who is a lady of good character, I shall, agreeably to precedent, give a sum to her *nomine expensarum*, and fix it at £400.”<sup>4</sup> But where parties against warning and persuasion had entered into an incestuous marriage, being mutually in fault, Sir John Nicholl in pronouncing it null refused costs to the woman.<sup>5</sup> It does not quite follow that our courts would feel authorized to award costs in this special English sense.

§ 857. **In Dissolution of Valid Marriage.**—The question of giving alimony on dissolving a valid marriage for a postnuptial cause could not have been decided in England prior to the settlement of this country, when the English law became ours, no court there having had the jurisdiction to dissolve such marriage until 1858.<sup>6</sup> Nor could the question often be agitated with us; because

<sup>1</sup> Godol. Abr. 508, 509; Bird v. Bird, 1 Lee, 621; Fischli v. Fischli, 1 Blackf. 360, 12 Am. D. 251. And see Bartlett v. Bartlett, Clarke, 460. In Zule v. Zule, Saxton, 96, the Chancellor seemed to consider this doctrine not fully settled, and queried whether the court declaring a nullity because of a pre-existing marriage could give alimony, but inclined to the opinion it could not. There is believed to be no authority in line with this query.

<sup>2</sup> Vanvalley v. Vanvalley, 19 Ohio St.

588; Strode v. Strode, 3 Bush, 227, 96 Am. D. 211; S. v. Smith, 19 Wis. 531.

<sup>3</sup> Chase v. Chase, 55 Me. 21.

<sup>4</sup> Scrimshire v. Scrimshire, 2 Hag. Con. 395, 4 Eng. Ec. 562, 574.

<sup>5</sup> Aughtie v. Aughtie, 1 Phillim. 201, 1 Eng. Ec. 72. The marriage is spoken of in this case both as being voidable and as being void. The date is 1810. So it was voidable. Vol. I. § 275, 276, 871, 878, note.

<sup>6</sup> Vol. I. § 153.



generally in our States the statutes expressly provide for a decree of alimony, or of division of the property, or both, on this sort of divorce.<sup>1</sup> Yet our few decisions accord with the reason of the unwritten law, which does not permit alimony where there is no longer a marriage. For example, when in Massachusetts an action of debt<sup>2</sup> was brought to enforce an alimony decree made on a dissolution, before the statute provided for such decree thereon, and the defendant denied by plea the jurisdiction to render it, judgment was given in his favor, it being deemed a mere nullity.<sup>3</sup> And in Pennsylvania the courts do not without legislative permission allow alimony on the divorce from the marriage bond. So that though it has been duly awarded on a divorce from bed and board, it ceases on a judicial dissolution of the marriage.<sup>4</sup> For the same reason, —

§ 858. **Death dissolving Marriage.** — The death of either of the parties dissolves the marriage.<sup>5</sup> Therefore, as already stated,<sup>6</sup> there can be no common-law alimony when either the husband or wife is dead. But in some of the States there are statutes permitting it during the wife's life, and so creating a liability on the deceased husband's estate.<sup>7</sup> The question of collecting arrears after death is for another chapter.<sup>8</sup>

§ 859. *Secondly. The wife, being by the unwritten law under no circumstances required to maintain the husband or contribute to his support,<sup>9</sup> can never be compelled to pay him alimony. Further as to which, —*

§ 860. **Inflexible — Statutory Modifications.** — This common-law

<sup>1</sup> See *Fischli v. Fischli*, 1 Blackf. 360, 12 Am. D. 251.

<sup>2</sup> The Massachusetts Court afterward decided that the proper form of suit to enforce a decree for permanent alimony is *scire facias*. *Morton v. Morton*, 4 Cush. 518. As to this, the practice in the States differs. And see *Lyon v. Lyon*, 21 Conn. 185; post, c. 34.

<sup>3</sup> *Davol v. Davol*, 13 Mass. 264. See *Jones v. Jones*, 18 Me. 308, 36 Am. D. 723; *Dean v. Richmond*, 5 Pick. 461. But see *Holmes v. Holmes*, 4 Barb. 295; *Crane v. Meginnis*, 1 Gill & J. 463, 19 Am. D. 237; *Richardson v. Wilson*, 8 Yerg. 67.

<sup>4</sup> *Blaker v. Cooper*, 7 S. & R. 500; *Smith v. Smith*, 3 S. & R. 248. There is a Florida case which allows alimony on a divorce *a vinculo* where the statute is

silent thereon. But the attention of the court did not advert to the distinction between the two kinds of divorce, in consequence of which omission the decision cannot be deemed of much weight. *Chaires v. Chaires*, 10 Fla. 308. See *Parsons v. Parsons*, 9 N. H. 309, 32 Am. D. 362; *Tewksbury v. Tewksbury*, 4 How. Missis. 109; *Sawyer v. Sawyer*, Walk. Mich. 48, 52.

<sup>5</sup> Ante, § 153.

<sup>6</sup> Ante, § 836.

<sup>7</sup> *Ib.*; *Smythe v. Banks*, 73 Ga. 303; *Storey v. Storey*, 125 Ill. 608. And see *Stratton v. Stratton*, 77 Me. 373, 52 Am. R. 779.

<sup>8</sup> Post, § 1097-1099.

<sup>9</sup> Ante, § 829.

rule is as inflexible as the reason on which it rests. But we shall see in subsequent chapters that in England and some of our States there are statutes which, under some other name than alimony, will sometimes restore to the husband something of what he had bestowed on the wife, or otherwise make for him some provision.

§ 861. Thirdly. *The guilty wife, having by her fault forfeited all claim upon her husband for necessities or other support,<sup>1</sup> cannot, after this fact has been adjudged against her, have alimony from him.*<sup>2</sup> But—

§ 862. In another Chapter—we shall see that this rule does not apply to temporary alimony, given to maintain the wife during a suit while yet her wrong does not appear in proof. As to the—

§ 863. **Rule in Permanent Alimony.**—Under the unwritten law, it is invariable that on a divorce of any sort pronounced against the wife in favor of the husband, she can have no allotment of alimony,<sup>3</sup> “even,” says Ayliffe, “though he had a considerable dowry with her.”<sup>4</sup> So long as he has committed no breach of marital duty, he is under no obligation to provide her a separate maintenance; for she cannot claim it on the ground of her own misconduct.<sup>5</sup> Still,—

§ 864. **Severity of Rule.**—While such is justice, and such the result necessarily derivable from the legal relation of husband and wife, there are circumstances wherein it is not mercy. For not so does mercy open the door of repentance to human frailty. And it may seem not unfrequently too heavy a visitation even of justice to deprive a woman who has erred, of the means of upright living, thus forcing her into prostitution, while repenting she seeks earnestly the paths of virtue.<sup>6</sup> The English Parliament

<sup>1</sup> Vol. I. § 1228.

<sup>2</sup> Latham v. Latham, 30 Grat. 307; Harris v. Harris, 31 Grat. 13; Lee v. Lee, 1 Duv. 196; Carr v. Carr, 22 Grat. 168, 173; Atwater v. Atwater, 53 Barb. 621.

<sup>3</sup> Godol. Abr. 508; 3 Bl. Com. 94; Palmer v. Palmer, 1 Paige, 276; Everett v. Everett, 52 Cal. 383; McIntire v. McIntire, 80 Mo. 470; Waring v. Waring, 100 N. Y. 570; 2 Chitty Gen. Pract. Am. ed. 462, 463.

<sup>4</sup> He adds: “But if she departs from her husband through any default of his, as on the account of cruelty and the like, then he shall in that case be compelled

to allow her alimony, though he had no dowry with her; for the law deems her to be a dutiful wife as long as the fault lies at his door.” Ayl. Parer. 58.

<sup>5</sup> Harris v. Harris, 31 Grat. 13.

<sup>6</sup> So, in Sheafe v. Sheafe, 4 Fost. N. H. 564, 568, Eastman, J. said: “It is not too much to suppose that there are those who would enter into the marriage relation solely with the view of possessing themselves of the property of their wives, and who would readily sacrifice their virtue if by so doing they could break up the marriage contract, and at the same time retain the property of which they had

had a practice, when giving to a husband a divorce from the bond of matrimony, of requiring him to make some provision for his discarded wife.<sup>1</sup> And Chancellor Walworth, in granting a divorce from bed and board to a husband for his wife's cruelty, said the court would allow her alimony if it had the power, and recommended to him that he accord it voluntarily.<sup>2</sup> Therefore at the call of mercy, —

§ 865. **Statutes** — in England<sup>3</sup> and some of our States have, in varying terms, authorized the courts to decree alimony to wives divorced for their fault, or to require from their husbands some other provision, when they deem best. One form of the statute is, as in New Hampshire, that “upon any decree of nullity or divorce the court may restore to the wife all or any part of her lands, tenements, and hereditaments, and may assign to her such part of the real and personal estate of her husband, or order him to pay such sum of money, as may be deemed just and expedient.” While under this sort of enactment the court will ordinarily allow alimony to a wife in whose behalf it grants a divorce for the husband's fault, it will sometimes, yet not commonly or as of course, give something to her on a divorce to him for her fault.<sup>4</sup> Further as to —

§ 866. **How the Discretion.** — The discretion thus to provide for a guilty wife is and should be exercised with great care. It is not the rule, but the exception, which only seldom prevails.<sup>5</sup> “We

gained possession. Nor is it too much to suppose that a weak-minded woman might become the victim of an artful and unprincipled husband; and yet in such a way that it would be impossible to produce any evidence implicating him in her fall. To cast such a woman destitute upon the world would be doing the grossest injustice, and at the same time be rewarding the most infamous iniquity.”

<sup>1</sup> 3 Law Reporter, 219. “And for this most just, humane, and moral reason, that she may not be driven by want to continue in a course of vice.” Best, J. in *Jee v. Thurlow*, 4 D. & R. 11, 17. Under the early system in Massachusetts, where in one reported instance the Governor and council gave a husband a divorce for his wife's adultery, they made her no allowance out of his estate. *Gage v. Gage*, 2 Dane Abr. 309, A. D. 1782.

<sup>2</sup> *Perry v. Perry*, 2 Barb. Ch. 311.

<sup>3</sup> 20 & 21 Vict. c. 85, § 32. It was refused in *Ratcliff v. Ratcliff*, 1 Swab. & T. 467, 474. See also *Robertson v. Robertson*, 6 P. D. 119, 8 P. D. 94.

<sup>4</sup> *Sheafe v. Loughton*, 36 N. H. 240; *Sheafe v. Sheafe*, 4 Fost. N. H. 564; *Janvrin v. Janvrin*, 59 N. H. 23; *Spitler v. Spitler*, 108 Ill. 120; *Miles v. Miles*, 76 Pa. 357; *Pence v. Pence*, 6 B. Monr. 496; *McCafferty v. McCafferty*, 8 Blackf. 218; *Gaines v. Gaines*, 9 B. Monr. 295, 303, 48 Am. D. 425; *Richardson v. Wilson*, 8 Yerg. 67; *Lovett v. Lovett*, 11 Ala. 763; *Coon v. Coon*, 26 Ind. 189; *Hedrick v. Hedrick*, 28 Ind. 291; *Cox v. Cox*, 25 Ind. 303. *Graves v. Graves*, 108 Mass. 314, and cases cited to the next section. The Connecticut statute is not interpreted to permit alimony to the guilty wife. *Allen v. Allen*, 43 Conn. 419.

<sup>5</sup> *Harris v. Harris*, 31 Grat. 13; *Zuver v. Zuver*, 36 Iowa, 190. See *Fry v. Fry*,

do not say," observed Cole, J., in the Iowa Court, "that there may not be cases in which it might 'be right and proper' to allow alimony to an adulterous, divorced wife. But it could only be so where the husband had acquired property by the wife, or she had been the meritorious cause of it by a comparative lifetime of industry or otherwise, and he was not without fault as respects her crime."<sup>1</sup> "In the present case," said Scholfield, J., in Illinois, "it appears that the husband has ample property for a comfortable maintenance for himself and family. The labor and frugality of the wife have contributed to its acquisition. She has passed the meridian of life and is without a separate estate. If the evidence does not show she was entirely justified in deserting her husband, it lacks so little that the difference is almost inappreciable. It is equitable that the husband out of his abundance should contribute to her support, to prevent her becoming a burden upon others, even if her conduct had been far more objectionable than it is proved to have been."<sup>2</sup>

§ 867. **Without Statutory Aid.** — it is believed, as stated in the first volume,<sup>3</sup> a court having equity powers, and probably any divorce court, may in a clear case require the husband to make some provision for his guilty wife, as the condition on which it will furnish the redress he prays.<sup>4</sup> On a like principle, —

§ 868. **Relief to Wife on Condition.** — Where a husband had made a settlement to the separate use of his wife and her children by a former marriage, and she sued him in an equity tribunal for a divorce from the bond of matrimony, the court declined

7 Paige, 461, 463; Fulk v. Fulk, 8 Blackf. 561.

<sup>1</sup> Fivecoat v. Fivecoat, 32 Iowa, 198, 199. Said Bell, J. in the New Hampshire Court: "The wife may be in the wrong. She may have an unhappy temper or an unfortunate disposition; she may have ill-treated her husband, or deserted him, or have otherwise misconducted herself, and yet the property she may ask as alimony may be all such as was her own before her marriage, or such as has been accumulated, in whole or in part, by her own industry; and her fault may be far from such as ought to be punished by the forfeiture of all her property, or her interest in the husband's property, thus leaving her to beg or starve. She may have so

conducted that her husband may be well entitled to a divorce, and yet she may be a wronged and injured woman; and there seems therefore to be good reason why the court should be vested with the power of making to her a just and reasonable allowance in any such case." Sheafe v. Loughton, 36 N. H. 240, 243.

<sup>2</sup> Deenis v. Deenis, 79 Ill. 74, 78. There is an earlier Illinois case — Reavis v. Reavis, 1 Scam. 242 — which we may presume would hardly be followed now. See also Dailey v. Dailey, Wright, 514, 517; Davis v. Davis, 86 Ky. 32.

<sup>3</sup> Vol. I. § 1633 and the note to § 1635.

<sup>4</sup> Prichard v. Prichard, 3 Swab. & T. 523, 525, 526.

to grant it except on condition that she would execute a reconveyance to him of the settled property.<sup>1</sup>

§ 869. Fourthly. *Alimony is in amount subject to variations from time to time as the circumstances, needs, and pecuniary condition of the parties change.*

§ 870. **Why?**—This doctrine rests in reasons already appearing,<sup>2</sup> and in the obvious fact that, being a substitute for the varying expenditures of a family in cohabitation, it must in a measure change from time to time as those expenditures would do. In addition to which reasons we have a judicial practice; thus,—

§ 871. **Divorce and Alimony Decrees separable.**—Besides the doctrine that divorce and alimony may be given in separate suits,<sup>3</sup> we have the rule of practice that at the discretion of the court the two questions may be divided in the same suit and the consideration of permanent alimony deferred until it is settled that there is to be a divorce.<sup>4</sup> Indeed, since by such division expense to the litigants and labor to the courts will be avoided should the divorce be refused, this has been deemed the true ordinary practice.<sup>5</sup> Hence,—

§ 872. **Alimony Decree subject to Change.**—Because the procedure of a court always bends with the right to which it gives effect,<sup>6</sup> it early became and it remains the doctrine in the country whence our laws are derived, and it is accepted and practised upon by a considerable proportion of our American tribunals, that the court may at any time and from time to time, on any change in the circumstances of the parties, increase or reduce the sum allotted for alimony, temporary<sup>7</sup> or permanent.<sup>8</sup> On the other hand,—

<sup>1</sup> *Oliver v. Oliver*, 5 Ala. 75. See *Orr v. Orr*, 8 Bush, 156; *Ainsworth v. Ainsworth*, 37 Ga. 627.

<sup>2</sup> Ante, § 822, 829, 834, 837, 840.

<sup>3</sup> Ante, § 840 et seq.

<sup>4</sup> *Pauly v. Pauly*, 69 Wis. 419; *Call v. Call*, 65 Me. 407; *Sheafe v. Loughton*, 36 N. H. 240, 243; *Gregory v. Gregory*, 5 Stew. Ch. 424; *Covell v. Covell*, Law Rep. 2 P. & M. 411; *Prescott v. Prescott*, 59 Me. 146; *Ex parte Ambrose*, 72 Cal. 398; post, § 1069, 1084.

<sup>5</sup> *Rea v. Rea*, 53 Mich. 40.

<sup>6</sup> Ante, § 822-824.

<sup>7</sup> *Cox v. Cox*, 3 Add. Ec. 276, 2 Eng. Ec. 531; *Amos v. Amos*, 3 Green Ch. 171;

*McGee v. McGee*, 10 Ga. 477, 491; *King v. King*, 38 Ohio St. 370.

<sup>8</sup> *Otway v. Otway*, 2 Phillim. 109; *Rogers v. Vines*, 6 Ire. 293; *Richmond v. Richmond*, 1 Green Ch. 90; *Bursler v. Bursler*, 5 Pick. 427; *Holmes v. Holmes*, 4 Barb. 295; *Barber v. Barber*, 1 Chand. 280; *Sheafe v. Sheafe*, 36 N. H. 155; *Saunders v. Saunders*, 1 Swab. & T. 72; *Foote v. Foote*, 22 Ill. 425; *Sparhawk v. Sparhawk*, 120 Mass. 390; *Coad v. Coad*, 41 Wis. 23; *Williams v. Williams*, 29 Wis. 517; *Waters v. Waters*, 49 Mo. 385; *Olney v. Watts*, 43 Ohio St. 499; *Ellis v. Ellis*, 13 Neb. 91. So also under the Arkansas statute, *Bauman v. Bauman*, 18

§ 873. **Denied.** — In some of our States, and as to applications for a change made after the term of the court has closed and it has arisen, this doctrine is in the absence of statutory help denied.<sup>1</sup> Sometimes the denial appears as a deduction from reason, and sometimes as an interpretation of the statute.<sup>2</sup>

§ 874. **Statutory Authorization.** — We have in some of the States statutes expressly giving to the courts this power of change.<sup>3</sup> Again, —

§ 875. **Decree reserving Power of Change.** — In some of the States, it is more or less the practice for the alimony decree to reserve to the court the power to change it from time to time.<sup>4</sup> There is no just ground to doubt the efficacy of such a reservation, and in prudence it ought to be made in States wherein the right in the absence of the reservation is unsettled or is denied. Or the court may see cause to order a mere nominal alimony for the time being,<sup>5</sup> and hold its power over the question until a more fit occasion arises in the indefinite future, — for which purpose this practice may be efficient. And the decree ought not then to be construed as settling what the tribunal meant it should not. In line with which view, the Upper Canada Court, having made a large increase of the original alimony, observed as to a possible application to reduce it, that “it will consider itself at liberty to consider the question anew, and to readjust the allowance proper to be made in the new state of affairs.”<sup>6</sup> Doubtless, if the learned judges were afterward called upon to readjust their decree, they followed the rule which they here prescribed for themselves.

§ 876. **Decree excluding Change.** — We have an intimation that perhaps the terms of a decree of alimony may operate to exclude any future modification.<sup>7</sup> But in reason, the question is differ-

Ark. 320, 68 Am. D. 171. As to Illinois, see *Wheeler v. Wheeler*, 18 Ill. 39; *Robbins v. Robbins*, 101 Ill. 416; *Stillman v. Stillman*, 99 Ill. 196, 39 Am. R. 21. As to Michigan, *Perkins v. Perkins*, 12 Mich. 456. And see post, § 1077.

<sup>1</sup> *Sammis v. Medbury*, 14 R. I. 214; *Stratton v. Stratton*, 73 Me. 481; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Johnson v. Johnson*, 65 How. Pr. 517.

<sup>2</sup> *Bacon v. Bacon*, 43 Wis. 197; *Fries v. Fries*, 1 MacAr. 291; *Mitchell v. Mitchell*, 20 Kan. 665; *Hardin v. Hardin*, 38 Tex. 616; *Kerr v. Kerr*, 59 How. Pr. 255;

*Kamp v. Kamp*, 59 N. Y. 212; *Park v. Park*, 18 Hun, 466. And see *Brenner v. Brenner*, 48 Ind. 262.

<sup>3</sup> *Shaw v. McHenry*, 52 Iowa, 182; *Weld v. Weld*, 28 Minn. 33.

<sup>4</sup> Ante, § 836; *Sammis v. Medbury*, 14 R. I. 214.

<sup>5</sup> See *Shotwell v. Shotwell*, Sm. & M. Ch. 51; *Lawson v. Shotwell*, 27 Missis. 630; *Chapman v. Chapman*, 13 Ind. 396; *Bankston v. Bankston*, 27 Missis. 692.

<sup>6</sup> *Severn v. Severn*, 7 Grant, U. C. Ch. 109.

<sup>7</sup> *Hyde v. Hyde*, 4 Swab. & T. 80.

ent here. The reserved power of modification stated in the last section implies an unfinished determination of the judicial mind, which does not die with the individual judge. But a living judge of to-day can settle only the question of to-day; he has no jurisdiction to bind the unseen, unknown, and unalleged future, and forbid his successor to act upon a future case in accordance with the future law.

§ 877. **Practical Rule for Change — Res Judicata.** — The principle that what is once adjudged is not to be retried prevails the same in these cases as in others.<sup>1</sup> As seen in the last two sections, if the court reserves anything on which it does not pass, that matter is open for future litigation. In the absence of any such reservation, the decree for alimony conclusively determines the proper sum under the then existing circumstances, and the revision of the question can proceed only on new facts.<sup>2</sup> But “where,” in the words of Dr. Lushington, “there is a material alteration of circumstances,<sup>3</sup> a change in the rate of alimony may be made. If the faculties are improved, the wife’s allowance ought to be increased; and if the husband is *lapsus facultatibus*, the wife’s allowance ought to be reduced. Applications of this sort are of rare occurrence. I only remember,” he added, “two instances where applications of either kind have been successful, — the case of Foulkes and Foulkes for an increase,<sup>4</sup> and Cox and Cox<sup>5</sup> for a reduction.”<sup>6</sup> To illustrate, —

§ 878. **Husband’s Misconduct.** — A decrease of the husband’s capacity to pay alimony, if brought about by his own misconduct, will not ordinarily entitle him to a reduction.<sup>7</sup> And under special circumstances such decrease from unprofitable speculations was held not to authorize a proportionate reduction of per-

<sup>1</sup> Petersine v. Thomas, 28 Ohio St. 596, 600, 601; Fischli v. Fischli, 1 Blackf. 360, 12 Am. D. 251.

<sup>2</sup> Weld v. Weld, 28 Minn. 33; Olney v. Watts, 43 Ohio St. 499; Petersine v. Thomas, supra; Buckminster v. Buckminster, 38 Vt. 248, 88 Am. D. 652; Fisher v. Fisher, 32 Iowa, 20; Blythe v. Blythe, 25 Iowa, 266; Wilde v. Wilde, 36 Iowa, 319; Goodman v. Goodman, 26 Mich. 417; Perkins v. Perkins, 12 Mich. 456; Parker v. Parker, 61 Ill. 369; Semrow v. Semrow, 23 Minn. 214.

<sup>3</sup> See Westmeath v. Westmeath, 3

Knapp, 42; Pemberton v. Pemberton, 2 Notes Cas. 17.

<sup>4</sup> Foulkes v. Foulkes, Poynter Mar. & Div. 256, note.

<sup>5</sup> Cox v. Cox, 3 Add. Ec. 276, 2 Eng. Ec. 531.

<sup>6</sup> De Blaquiere v. De Blaquiere, 3 Hag. Ec. 322, 329, 5 Eng. Ec. 126, 129.

<sup>7</sup> Lockridge v. Lockridge, 2 B. Monr. 528, 3 Dana, 28, 28 Am. D. 52. And see Rees v. Rees, 3 Phillim. 387, 1 Eng. Ec. 418; Kirkwall v. Kirkwall, Poynter Mar. & Div. 255, note; Fisher v. Fisher, 32 Iowa, 20.

manent alimony, allotted twenty years before.<sup>1</sup> But to allow no reduction where he had acted in good faith,<sup>2</sup> perhaps in some circumstances to decline the full reduction, would be plainly unjust; since, on the other hand, an increase of faculties through speculation would prompt an increase of the alimony.<sup>3</sup>

§ 879. **Wife's Misconduct.** — A wife's subsequent lewdness was once, under special terms of the statute, held to be no obstruction to the recovery of her full alimony.<sup>4</sup>

§ 880. **Supporting Dependent Person.** — It was once adjudged not to justify an increase of alimony that the wife was supporting a person whom the husband is under no legal obligation to maintain.<sup>5</sup>

§ 881. **Husband having paid Wife's Debts.** — If, before the permanent alimony was awarded, the wife had extravagantly contracted debts on his account, and he has paid them, he cannot for this cause have the alimony reduced. As in one case said by Dr. Lushington: "The whole fault is at the door of the husband: he compelled her to leave his home, and left her without the means of subsistence, and so situated it might be difficult for her to get credit and live economically. But be this as it may, the application is altogether too late; and such a deduction from permanent alimony would be without precedent."<sup>6</sup> Plainly, in reason, a matter of this sort is concluded by the original alimony decree.

§ 882. *Fifthly. When the public good, concurring with private right, permits a divorce, the public has little special interest in the further question of alimony, and the fair and just bargainings of the parties concerning it will be upheld.*

§ 883. **In a Preceding Chapter,** — the general question of bargainings between the married parties in a divorce cause is considered.<sup>7</sup> Now, specially as to —

§ 884. **Alimony Bargainings.** — Where parties about to apply for a divorce, or while a divorce suit is pending, undertake to arrange questions of alimony between themselves, they are liable to fall upon some of the collateral obstructions stated in the preceding

<sup>1</sup> Neil v. Neil, 4 Hag. Ec. 273.

<sup>2</sup> Post, § 898, 899, 902.

<sup>3</sup> Graves v. Graves, 108 Mass. 314;

Moore v. Moore, 3 Swab. & T. 606.

<sup>4</sup> Sloan v. Cox, 4 Hayw. 75, 76, 77.

See Begbie v. Begbie, 3 Halst. Ch. 98;

Griffin v. Griffin, 23 How. Pr. 189, 21 Ib.

364; Forrest v. Forrest, 8 Bosw. 640.

<sup>5</sup> Halsted v. Halsted, 5 Duer, 659.

<sup>6</sup> Harmar v. Harmar, Deane & S. 282,

284.

<sup>7</sup> Ante, § 690-730.



chapter just cited. But if nothing is done intended or adapted to stimulate the divorce proceeding, or to keep any facts from the court, or to work any sort of fraud upon the public or the law, effect will be given to such mutual property or alimony arrangements as they may fairly make. They ought to lay their bargaining before the tribunal,<sup>1</sup> and if on inquiry it finds the provision for alimony fair and equitable,<sup>2</sup> it will enter a decree pursuant thereto.<sup>3</sup> And —

§ 885. **Not laid before Court.** — If the agreement is of a sort not properly within the divorce decree,—as, if it transfers to the wife needful furniture which is delivered into her possession,<sup>4</sup>—and is free from any of the objections before alluded to, and there is no occasion for the judge to be made acquainted with it, there appears to be a possibility of its standing, though not seen by him. But it has been held that any contract between husband and wife while a divorce suit is pending between them, and not laid before the court, whereby property is to be transferred to her if the divorce is rendered without alimony, is void as contrary to public policy.<sup>5</sup> Yet the objection in this sort of case may be obviated by fully acquainting the court with the arrangement, at the proper time in the course of the divorce suit.<sup>6</sup> So likewise a postnuptial provision for the wife, not made in contemplation of divorce proceedings, is unobjectionable, and even in a divorce suit it will be so treated.<sup>7</sup>

§ 886. **Subsequent Bargainings.** — After a marriage is dissolved, the now discoverd *feme* may make contracts relating the same to

<sup>1</sup> Ante, § 702; *Moon v. Baum*, 58 Ind. 194.

<sup>2</sup> *Daggett v. Daggett*, 5 Paige, 509, 28 Am. D. 442; *Speck v. Dausman*, 7 Mo. Ap. 165; *Moon v. Baum*, supra; *Adams v. Adams*, 25 Minn. 72. And see *Wallingsford v. Wallingsford*, 6 Har. & J. 485; *Threewits v. Threewits*, 4 Des. 560; *Hooper v. Hooper*, 1 Swab. & T. 602.

<sup>3</sup> *Crews v. Mooney*, 74 Mo. 26; *Storey v. Storey*, 125 Ill. 608; *Martin v. Martin*, 65 Iowa, 255; *Senter v. Senter*, 70 Cal. 619; *Stratton v. Stratton*, 77 Me. 373, 52 Am. R. 779; *Daggett v. Daggett*, 5 Paige, 509, 28 Am. D. 442. And see *Rogers v. Rogers*, 4 Paige, 516, 27 Am. D. 84; *Kirby v. Kirby*, 1 Paige, 565; *Petersine v. Thomas*, 28 Ohio St. 596; *Adams v. Adams*, 25 Minn. 72; *Speck v. Dausman*,

7 Mo. Ap. 165. And see for some principles applicable in the case, *P. v. Mercein*, 8 Paige, 47, 68; *Wallingsford v. Wallingsford*, 6 Har. & J. 485; *Converse v. Converse*, 9 Rich. Eq. 535.

<sup>4</sup> *Nicol v. Nicol*, 30 Ch. D. 143, 31 Ch. D. 524.

<sup>5</sup> *Speck v. Dausman*, 7 Mo. Ap. 165; *Seeley's Appeal*, 56 Conn. 202. And see *Jordan v. Westerman*, 62 Mich. 170, 4 Am. St. 836; *Born v. Horstmann*, 80 Cal. 452; *McCabe v. Britton*, 79 Ind. 224; *Cross v. Cross*, 63 N. H. 444; *Gray v. Gray*, 83 Mo. 106.

<sup>6</sup> *Chapin v. Chapin*, 135 Mass. 393.

<sup>7</sup> *Calame v. Calame*, 10 C. E. Green, 548. And see *McLaren v. McLaren*, 33 Ga. Supp. 99.

her alimony as to any other property interest.<sup>1</sup> After a divorce from bed and board, where the wife remains under the disabilities of coverture, she is at least restricted in her bargainings with her husband about alimony, but the doctrine is not nicely defined in adjudication.<sup>2</sup>

§ 887. *The Doctrine of this Chapter restated.*

Alimony is a periodical sum for maintenance, by judicial order allotted to be given from the husband to the wife during a separation, in lieu of the support which otherwise he would render her in cohabitation. Commonly the order for it is made only in a divorce suit, as an accompaniment or appendage thereto. The courts are not agreed upon the exceptions to this rule. Some appear not to acknowledge any exception; others, far on the other side, permit equity to decree alimony in a suit for it alone where no divorce is asked. The better doctrine appears to be that there can be no judicial alimony without a judicial separation, yet that where there has been such a separation without any adjudication as to alimony, the court may order it on a supplemental suit instituted therefor. In like manner, since from the nature of alimony it is variable from time to time, the court may at any time alter a decree for it, on new facts appearing. By the unwritten law, a marriage is essential to alimony, which cannot exist in its absence. So that, for example, there can be no alimony based on a decree of divorce from the bond of matrimony. But universally the statutes permit it on such decree. Under the supervision of the court, and to an extent not interfering with the due administration of divorce justice, parties litigating may bargain with each other about the alimony, — rather treacherous ground, to be trodden only with care.

<sup>1</sup> Preston v. Williams, 81 Ill. 176;      <sup>2</sup> De Blaquiére v. De Blaquiére, 3 Hag. Blake v. Blake, 7 Iowa, 46; Chapin v. Ec. 322, 5 Eng. Ec. 126, 128. Chapin, 135 Mass. 393.

## CHAPTER XXVIII.

## THE HUSBAND'S FACULTIES WHENCE ALIMONY PROCEEDS.

§ 888. **Meaning of "Faculties."**—This word in both its singular and plural forms is common in the canon, Scotch, ecclesiastical, and some other laws. In the singular, it means a license or granted privilege to do a thing, comprehending refinements not necessary to be here explained.<sup>1</sup> In the law of alimony, as derived by us from the English ecclesiastical courts, it signifies in its plural form the earnings, income, fixed property, or anything else, which the court takes into consideration in determining the sum or sums it will award for alimony, whether temporary or permanent.

§ 889. **Ground for Alimony.**—Of the various considerations which influence the courts in fixing the amount of alimony, to be explained in chapters further on, this of the husband's faculties occupies the leading place.

§ 890. **Doctrine of Faculties defined.**—The husband's faculties are his capabilities of maintaining a family, ordinarily consisting of his income from whatever source derived. But if he refuses to acquire income, the sum which he might obtain by due exertion is also to be estimated as faculties. It remains to specify some of the particulars; thus,—

§ 891. **Tangible Property**—is never to be disregarded.<sup>2</sup> Even what has come to the husband since the commencement of the suit should be taken into the account with the rest.<sup>3</sup>

§ 892. **Ability to earn Money**—(**Income from Earnings**).—The husband's duty to maintain his wife does not depend alone on his

<sup>1</sup> For illustrations, see *Hallack v. University of Cambridge*, 1 Q. B. 593; *Butt v. Jones*, 2 Hag. Ec. 417; *Groves v. Hornsey*, 1 Hag. Con. 188; *Warner v. Gater*, 2 Curt. Ec. 315; *Thomas v. Morris*, 1 Add. Ec. 470; *Steeven v. St. Martin Orgars*, 2 Add. Ec. 255.

<sup>2</sup> *Phelan v. Phelan*, 12 Fla. 449; *Bailey v. Bailey*, 21 Grat. 43.

<sup>3</sup> *Sparhawk v. Sparhawk*, 120 Mass. 390. See *Moore v. Moore*, 3 Swab. & T. 606. But see *Bankston v. Bankston*, 27 Missis. 692; *Cralle v. Cralle*, 79 Va. 182.

having visible property. While the parties are in cohabitation, each should by personal exertion contribute to a common fund, which in law is the husband's, and from which the wife may claim support.<sup>1</sup> So that the wife's earnings are to be taken into the account with his; and there seems no reason why, contrary to an intimation from a learned judge,<sup>2</sup> her mere ability to earn money should not be also. Plainly the husband's ability is the measure of his duty; so that if he exerts himself, his actual earnings become faculties for alimony, or if he will not exert himself, his capacity for earning must be estimated.<sup>3</sup> Further—

§ 893. **To Explain — (Personal Exertions and Property compared).**

— A wife compelled to seek divorce loses no right of maintenance, but she is to draw it in a different way; namely, through a decree for alimony, based, if the husband has no property, on his earnings or ability to earn money.<sup>4</sup> But when the income proceeds from his personal exertions, the proportion for alimony is according to some of the cases less than when it is derived from permanent property.<sup>5</sup> And this would seem to be reasonable; because where the husband has wealth and chooses to live on it without personal exertion, his wife should enjoy the luxury with him, but where he earns his income by labor she has no just claim to be supported in idleness. From all which we discover that the husband's faculties, while somewhat differently regarded according to their source, consist of —

§ 894. *The Actual or Potential Income* : —

**In General.** — There may be exceptional circumstances wherein alimony should be permitted to go beyond the income, and draw

<sup>1</sup> Vol. I. § 1801, 1802; *Miller v. Miller*, 75 N. C. 70; *Goodheim v. Goodheim*, 2 Swab. & T. 250, 252. And see *Burrows v. Burrows*, Law Rep. 1 P. & M. 554; *Hoffman v. Hoffman*, 7 Rob. N. Y. 474.

<sup>2</sup> The judge ordinary in *Goodheim v. Goodheim*, *supra*.

<sup>3</sup> *Pauly v. Pauly*, 69 Wis. 419; *Muse v. Muse*, 84 N. C. 35. And see *In re Spencer*, 82 Cal. 110; *Luthe v. Luthe*, 12 Colo. 421.

<sup>4</sup> *Holmes v. Holmes*, 2 Stew. Ch. 9; *Prince v. Prince*, 1 Rich. Eq. 282; *Kirby v. Kirby*, 1 Paige, 261, 262; *McCrocklin v. McCrocklin*, 2 B. Monr. 370; *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178;

*Lawrence v. Lawrence*, 3 Paige, 267; *Bursler v. Bursler*, 5 Pick. 427; *Batley v. Batley*, 1 R. I. 212; *Eidenmuller v. Eidenmuller*, 37 Cal. 364, 366; *Bailey v. Bailey*, 21 Grat. 43; *Thompson v. Thompson*, Law Rep. 1 P. & M. 553; *Campbell v. Campbell*, 37 Wis. 206; *Carlton v. Carlton*, 44 Ga. 216. But see *Tewksbury v. Tewksbury*, 4 How. Missis. 109; *Feigley v. Feigley*, 7 Md. 537, 61 Am. D. 375; *Sheafe v. Sheafe*, 36 N. H. 155. And see *Schmidt v. Schmidt*, 26 Mo. 235.

<sup>5</sup> *Cooke v. Cooke*, *supra*; *Stone v. Stone*, 3 Curt. Ec. 341, 7 Eng. Ec. 437; *Hawkes v. Hawkes*, 1 Hag. Ec. 526, 3 Eng. Ec. 230; *Poynter Mar. & Div.* 250.

upon the substance, or principal, of the husband's estate.<sup>1</sup> But in the ordinary case it is based on his income,<sup>2</sup> though the sources of it and other helpful facts<sup>3</sup> are taken also into the account in determining the amount. In the words of Dr. Lushington, "the wife is at liberty to plead the income of the husband, and the sources whence it is derived."<sup>4</sup> Some of the particulars are the following,—

§ 895. **Vested and Expectant.**—If the husband has a vested estate, of which he is to have possession only on the death of another person, so that it brings him no immediate income, yet it is a thing of value under his control, some estimate must be made of it among his faculties. Precisely its effect will depend on shifting complications of circumstances, not admitting of being stated in the form of a rule. "I think," said Dr. Lushington, "that with regard to permanent alimony the court would make a different allotment in a case where the income of the husband was derived from his sole personal labor or exertions,<sup>5</sup> from what it would do when he had moreover a large reversionary property in expectancy."<sup>6</sup> But—

§ 896. **Property of Parents**—is different, adult children having no legal claim upon it, or to parental support. But in England the allegation of faculties mentions that of the husband's father, yet not its amount, nor should the husband in answering it state the amount of the wife's father's;<sup>7</sup> though "a case may possibly arise in which, under very peculiar circumstances, the court would allow the property of the husband's father to be stated."<sup>8</sup> In reason, and in the ordinary case, matter of this sort should have but little influence upon the original award of alimony. When the parents die, and the children come into their inheritance, it should be readjusted.

§ 897. **Life-insurance Policy.**—The husband, in estimating his income, is not permitted any deduction on account of an insurance

<sup>1</sup> *Schmidt v. Schmidt*, 26 Mo. 235, 236.

<sup>2</sup> *Campbell v. Campbell*, 37 Wis. 206; *Thompson v. Thompson*, Law Rep. 1 P. & M. 553; *Miller v. Miller*, 75 N.C. 70; *Hyde v. Hyde*, 4 Swab. & T. 80; *Jenkins v. Jenkins*, 69 Ga. 483; *Higgs v. Higgs*, 3 Hag. Ec. 472, 5 Eng. Ec. 186.

<sup>3</sup> *Carlton v. Carlton*, 44 Ga. 216.

<sup>4</sup> *Stone v. Stone*, 3 Curt. Ec. 341, 7 Eng. Ec. 437.

<sup>5</sup> Ante, § 892, 893.

<sup>6</sup> *Stone v. Stone*, 3 Curt. Ec. 341, 7 Eng. Ec. 437.

<sup>7</sup> *Harris v. Harris*, 1 Hag. Ec. 351, 3 Eng. Ec. 153; *Bruere v. Bruere*, 1 Curt. Ec. 566, 6 Eng. Ec. 391.

<sup>8</sup> Dr. Lushington, in *Stone v. Stone*, 3 Curt. Ec. 341, 7 Eng. Ec. 437.

policy on his life for which he pays an annual premium; since the policy is at any time convertible into money.<sup>1</sup> But where, under a settlement, the policy was for the benefit of the wife and children after his death, and his employers paid over the premium and took it out of his wages, he was held entitled to have it deducted from his income for alimony.<sup>2</sup>

§ 898. **Affected by Good or Bad Management.**—As the husband's capability for earning money is one of the faculties recognized by the law,<sup>3</sup> and as a woman in entering matrimony contracts with the man as much in reference to his capacity for managing an estate as to the estate itself,<sup>4</sup> his actual income furnishes substantially the standard, whether it is greater or less in consequence of his good or bad management,—a proposition subject to be controlled, in favor of the wife, where there is lack of good faith in the husband.<sup>5</sup> Further as to—

§ 899. **Good Faith—(Bad Management—Fraudulent).**—A husband claiming a deduction for his own bad management, particularly since the *delictum*, must show clearly that at least he acted in good faith. And encumbrances on his estate caused by his profligacy and extravagance will not be deducted to their full amount.<sup>6</sup> Especially a partly fraudulent and colorable assignment of all his property, executed after the commencement of the suit, cannot in any degree impair the rights of the wife; for “if such a contrivance could avail, no injured wife could ever hope for justice.”<sup>7</sup> So if the husband after the dereliction, *a fortiori* after the commencement of the divorce suit, grants an annuity out of his estate, “this is not a deduction he is entitled to make. The utmost the court could allow would be the interest of the debt; and even then the husband should satisfy the court that the debt was contracted before the injury done.”<sup>8</sup>

<sup>1</sup> Harris v. Harris, 1 Hag. Ec. 351, 3 Eng. Ec. 153. See also Frankfort v. Frankfort, 4 Notes Cas. 280, 282; Pemberton v. Pemberton, 2 Notes Cas. 17.

<sup>2</sup> Forster v. Forster, 2 Swab. & T. 553.

<sup>3</sup> Ante, § 892, 893.

<sup>4</sup> See Vol. I. § 1786, 1787, 1801, 1802.

<sup>5</sup> Ante, § 890, 892, 893; Brisco v. Brisco, 2 Hag. Con. 199, 201; Higgs v. Higgs, 3 Hag. Ec. 472, 5 Eng. Ec. 186; Cooke v. Cooke, 2 Phillim. 40, 1 Eng. Ec. 178; Miller v. Miller, 6 Johns. Ch. 91; Frankfort v. Frankfort, 4 Notes Cas. 280,

282; Foulkes v. Foulkes, Poynter Mar. & Div. 256, note; Stone v. Stone, 9 Jur. 381.

<sup>6</sup> Mytton v. Mytton, 3 Hag. Ec. 657, 5 Eng. Ec. 249; Kirkwall v. Kirkwall, Poynter Mar. & Div. 255, note. And see Neil v. Neil, 4 Hag. Ec. 273.

<sup>7</sup> Brown v. Brown, 2 Hag. Ec. 5, 4 Eng. Ec. 11. See Frakes v. Brown, 2 Blackf. 295; Dunnock v. Dunnock, 3 Md. Ch. 140; Forrest v. Forrest, 8 Bosw. 640.

<sup>8</sup> Rees v. Rees, 3 Phillim. 387, 391, 1 Eng. Ec. 418, 419, by Sir John Nicholl.

§ 900. **Non-productive.** — An investment called non-productive is not necessarily or commonly such in fact. For example, if a stock enterprise is managed with a view to increasing the capital by withholding dividends, there is as truly an income as if dividends were received and reinvested. Therefore all marketable securities must be taken into the account, since otherwise the husband could tie up his funds and evade the wife's claim altogether.<sup>1</sup> And the like principle applies to lands not productive immediately, or proportionately to the sum they could be sold for, held wholly or in part for their prospective increase in value. The wife is not to be deprived of her alimony though the husband, to furnish it, should be compelled to change some of his investments.<sup>2</sup> Of the seemingly non-productive sort is the —

§ 901. **Husband's Habitation.** — If the dwelling-house and its appurtenances, where the husband resides after the divorce, are in appearance non-productive, they are not so in fact. They stand in the place of the rent which otherwise he would pay, consequently they should be reckoned among his faculties the same as though they were let.<sup>3</sup>

§ 902. **Loss by Speculation** — was spoken of in the last chapter.<sup>4</sup> On an application to reduce the alimony, Dr. Lushington said: "How has the reduction of income on the part of the husband been occasioned? It is manifest that he was at one time in possession of a large capital, and if he has thought fit to enter into large speculations, purchasing Mexican bonds and shares nearly to the amount of £7,000, it becomes a matter of grave consideration whether because these investments happen for the present to be unprofitable, the wife — who is now increasing in years, and who,

On a statutory division of property in Tennessee, it was held both that the interests of creditors cannot prevent the division, while yet they will be taken into the account, and that debts of the husband will not deprive the wife of her share. But this conclusion was derived largely from the special object and terms of the statute. *Chunn v. Chunn*, Meigs, 131. Such is not the rule, in alimony proper. If the inquiry is as to how much the husband is worth, his debts must be deducted from his visible means; if (which is the true inquiry) as to his income, still the interest-money which he pays to keep down his debts must be deducted. But

when, in cases of insolvency, the question relates to a settlement upon the wife of her own property, such as *choses in action*, the rule is properly different. *Vaughan v. Buck*, 3 Eng. L. & Eq. 135; *Davis v. Newton*, 6 Met. 537, 544; 1 Bishop Mar. Women, § 653, 657, 678–681.

<sup>1</sup> *Harris v. Harris*, 1 Hag. Ec. 351, 3 Eng. Ec. 153; ante, § 878.

<sup>2</sup> *Close v. Close*, 10 C. E. Green, 434.

<sup>3</sup> *Brisco v. Brisco*, 2 Hag. Con. 199; *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178; *De Blaquiére v. De Blaquiére*, 3 Hag. Ec. 322, 5 Eng. Ec. 126, 129.

<sup>4</sup> Ante, § 878.

it must be remembered, is quite incompetent to contradict the statements of the husband as to his property — should suffer a reduction of alimony. . . . If he chooses to speculate, he must if unsuccessful bear the inconvenience.”<sup>1</sup> But whatever may be deemed of this view, which is not absolutely without question in a case of admitted good faith, it can have no application to an unfortunate speculation made before he committed the matrimonial offence. Even —

§ 903. **Given away.** — Where a husband, the wife joining, had six years before the divorce suit conveyed in gift lands to their infant child, she was adjudged not entitled to alimony out of them.<sup>2</sup>

§ 904. **Computation for what Period.** — “The court looks to the average earnings of the husband for the last few years, and it assumes that in the current year his earnings will be about at the same rate;” so that although he is out of business and nothing is at the time of the hearing coming in, alimony may still be awarded against him.<sup>3</sup> Lord Penzance would not accept as sufficient an artist’s answer that during the nine years of the marriage his income had been fluctuating and uncertain, averaging no more than a sum named. He said “that to take any one year, or any particular number of years, as the standard of the husband’s present professional income might be unjust, and the court does not propose to do so.” But the respondent should specify “the amount of his income during the last three years at least. I think that is reasonable; but he will be at liberty, in addition, to set out his income during each of the nine years if he pleases, and also to state any circumstances which may account for his income being larger in one year than another. The court has to ascertain as well as it can the amount of his present income, and any facts tending to throw light on that question should be stated.”<sup>4</sup>

§ 905. **Husband’s Debts and his Creditors.** — It has never been doubted that the *bona fide* debts of the husband are to be brought into the account in diminution of his faculties. While on the one hand creditors are not to be defrauded, neither on the other hand

<sup>1</sup> Neil v. Neil, 4 Hag. Ec. 273, 274.  
And see Theobald v. Theobald, 15 P. D. 26.

<sup>3</sup> Thompson v. Thompson, Law Rep. 1 P. & M. 553.

<sup>4</sup> Williams v. Williams, Law Rep. 1 P. & M. 370, 371. And see, as to this, Kelly v. Kelly, 1 Spinks, 412.

<sup>2</sup> Bruner v. Bruner, 115 Ill. 40.



is the wife. From the time of the *delictum*, or of the suit brought, or of the decree,—the general rule is, from the time of the known *delictum*,—the law looks upon her as a creditor, and protects her from the frauds of her husband and his confederates. Fraudulent conveyances may be set aside as made to defeat her rights. This sort of question presents itself in many aspects, and in complications with differing statutes and forms of judicial practice in our several States. It is believed that no further elucidations of it would be profitable here, unless more space were occupied than can be spared for the subject.<sup>1</sup> Yet some help may be derived from the chapter on the procedure in alimony.<sup>2</sup>

§ 906. *The Doctrine of this Chapter restated.*

The husband's means and ability to pay alimony are termed his faculties. In a particular case—for example, where he lives on a permanent fixed salary and is without actual property—his faculties are a very simple affair. But in cases of a different sort the question may be complicated and difficult. The husband's means of livelihood may be fluctuating and uncertain, one year a large sum coming in, another a loss suffered, and a third a small sum acquired; in which cases, the family expenses go on the same in one year as in another. Therefore the court in fixing the alimony must exercise its discretion, estimating the faculties, not as they exist either at their ebb or at their flood, but at a reasonable point between the two. Other considerations are stated in this chapter, not necessary to be repeated.

<sup>1</sup> Ante, § 899, note; McGhee v. McGhee, 2 Sneed, 221; Chase v. Chase, 105 Mass. 385; Nix v. Nix, 10 Heisk. 546; Venable v. Craig, 44 Ga. 437; Turner v. Turner, 44 Ala. 437; Smith v. Brown, 34 Mich. 455; Bailey v. Bailey, 61 Me. 361; Morrison v. Morrison, 49 N. H. 69; Bouslough v. Bouslough, 68 Pa. 495; Dugan v. Trisler, 69 Ind. 553; Foster v. Townshend,

6 Daly, 136, 68 N. Y. 203; Dutton v. Jackson, 2 Del. Ch. 86; Barrett v. Barrett, 5 Or. 411; Spencer v. Spencer, 9 R. I. 150; In re Garrett, 11 Bankr. Reg. 493, 2 Hughes C. C. 235; Cain v. McHarry, 2 Bush, 263; Carithers v. Venable, 52 Ga. 389.

<sup>2</sup> Post, § 1103-1105.

## CHAPTER XXIX.

## TEMPORARY ALIMONY DURING LITIGATION.

- § 907-909. Introduction.
- 910-921. General Doctrine.
- 922-928. The Marriage.
- 929-944. Other Prerequisites.
- 945-954. The Amount.
- 955-964. Beginning and Termination.
- 965. Doctrine of Chapter restated.

§ 907. "**Alimony**," "**Suit-Money**" — (**Meanings**). — Suit-money, which in England is called costs, is often but not uniformly or perhaps generally in this country included in the word "alimony." Still, with some judges it is common to employ the term "temporary alimony" as denoting both temporary alimony proper and suit-money. It is believed to be the better practice, and promotive of greater precision in our legal language, to designate each by its distinctive name, and, since they differ somewhat, to contemplate them separately.<sup>1</sup> Sometimes, in a loose way, an allowance to the wife for the support of children is spoken of as alimony,<sup>2</sup> but this is not common. Therefore —

§ 908. **Elsewhere and Here.** — We shall carry to a chapter further on,<sup>3</sup> what is to be said of the judicial orders for the support of children, and the next chapter will be devoted to suit-money. Though the principles regulating temporary alimony and suit-

<sup>1</sup> I cite a few of the later cases as helpful to readers inquiring into the practical use of these words. *White v. White*, 73 Cal. 105; *Lane v. Lane*, 22 Ill. Ap. 529; *Cralle v. Cralle*, 81 Va. 773; *Wagner v. Wagner*, 39 Minn. 394; *Barnes v. Barnes*, 59 Iowa, 456; *Clarkson v. Clarkson*, 20 Mo. Ap. 94; *Edwards v. Edwards*, 80 Ala. 97; *O'Brien v. O'Brien*, 19 Neb. 584; *Freeman v. Freeman*, 8 Abb. N. Cas. 174; *Rowell v. Rowell*, 63 N. H. 222; *Ray-*

*mond v. Raymond*, 13 Bradw. 189; *Glenn v. Glenn*, 44 Ark. 46; *Prosser v. Prosser*, 64 Iowa, 378; *Robinson v. Robinson*, 79 Cal. 511; *S. v. Seddon*, 93 Mo. 520; *Henderson v. Henderson*, 110 Ind. 316; *Clyde v. Peavy*, 74 Iowa, 47; *Lea v. Lea*, 104 N. C. 603.

<sup>2</sup> *Foss v. Foss*, 100 Ill. 576; *Firman v. Firman*, 109 Ill. 63.

<sup>3</sup> *Post*, c. 37.

money are largely the same, no embarrassment will come from this separation. A temporary-alimony doctrine is no less true because it applies also to suit-money. The amounts of the allowance will differ simply as under the one arrangement we should have a single sum, and under the other we have two sums easily added together. In this chapter,—

§ 909. **How Chapter divided.**—We shall consider, I. The General Doctrine; II. The Marriage on account of which the Temporary Alimony is given; III. Other Prerequisites; IV. The Amount; V. The Beginning and Termination of the Temporary Alimony.

### I. *The General Doctrine.*

§ 910. **Non-cohabitation during Suit.**—While a divorce or nullity suit is pending, whatever its merits or anticipated results, the law does not permit the parties to be living in cohabitation,<sup>1</sup>—a proposition to which in special circumstances the nullity suit furnishes an exception.<sup>2</sup> Not even should the wife accept the husband's offer of support in his own house with separate beds.<sup>3</sup> Hence,—

§ 911. **Alimony to Wife.**—The mere pendency of the suit, where the wife has no separate means adequate to her support, and the husband has the means, entitles her, whether plaintiff or defendant, to alimony while the litigation continues.<sup>4</sup> But—

§ 912. **Suits not for Divorce.**—In most suits between married parties other than for divorce, there is no issue which would be prejudiced by cohabitation. Therefore<sup>5</sup> in them the wife cannot leave the matrimonial home and claim a separate support. Even a widow proceeding for dower is not entitled to temporary alimony

<sup>1</sup> Vol. I. § 1757; ante, § 273, 279-281, 295; *Chapman v. Chapman*, 10 C. E. Green, 394.

<sup>2</sup> Thus, on the hearing of a wife's complaint for the husband's impotence, the court was not fully satisfied with the proofs, and suspended its decree. Afterward, the learned judge being informed by affidavits that she had returned to cohabitation, and still there was no consummation of the marriage, pronounced for the nullity. *M. v. H.* 3 Swab. & T. 592.

<sup>3</sup> *Sykes v. Halstead*, 1 Sandf. 483. And see *Pinckard v. Pinckard*, 22 Ga. 31, 68 Am. D. 481; *Brown v. Smith*, 83 Ill. 291.

<sup>4</sup> *Jones v. Jones*, 2 Barb. Ch. 146; *Story v. Story*, Walk. Mich. 421; *S. v. Seddon*, 93 Mo. 520; Shelf. Mar. & Div. 533, 586; *Wilson v. Wilson*, 2 Hag. Con. 203; *Burrill Law Dict. tit. Alimony*; 2 Chit. Gen. Pract. Am. ed. 463; Ayl. Parer. 59; Oughton, tit. 206.

<sup>5</sup> *Simond's Case*, Sir F. Moore, 874.

out of the estate of her late husband. The reasons for it do not exist. And, said a learned Chancellor, "I know of no case in which this claim is allowed except as against the husband himself, and that only as incidental to a bill for divorce or other relief against the husband, except in the case specially provided by our statute,"<sup>1</sup>—a proposition, it would appear, not absolutely without exception. For on a widow's suit against her late husband's administrator to confirm an antenuptial agreement for her support after his death, it appearing that in some form she was entitled to means out of the estate, either under the agreement or outside of it, an allowance *pendente lite* was made her.<sup>2</sup> Here the reason is exactly the same which prompts the temporary alimony in a divorce suit. And—

§ 913. **Incidents varying with Reasons.**—When in these non-divorce cases alimony is given, it is shaped to accord with the prompting reasons. Thus, where a wife was seeking to enforce against her husband an agreement to pay her a separate maintenance, and he offered to cohabit with her, but she had exhibited articles of peace against him and had him under recognizance for good behavior, Lord Hardwicke observed that this was "an excuse, at least, for keeping from him for some time, till their passions might be supposed to subside, and they had a prospect from the interposition of friends to live happily together." Therefore he ordered him to pay her a gross sum, adding: "This is not making a decree, as has been said, before the hearing, but only doing what the husband himself is obliged to do, maintain the wife till the cause is heard upon the merits. And what I say now is abstracted entirely from any decree the court may think proper to make, if there should not then appear to be a foundation for the agreement set up by the bill."<sup>3</sup> The allowance was not a standing periodical one under a general order, as alimony commonly is; because it might be proper for the parties before the termination of the suit to come together again, whereas in proceedings for divorce a reunion can never be proper until the cause is ended.

§ 914. **Rare.**—If, outside of the divorce suit, this doctrine is not established by decisions as numerous as we might wish, the

<sup>1</sup> Rockwell v. Morgan, 2 Beasley, 119, 120, 121.

<sup>2</sup> Culver v. Culver, 8 B. Monr. 128, 129, 130.

<sup>3</sup> Head v. Head, 3 Atk. 295. See also

D'Arusmont v. D'Arusmont, 8 West. Law Jour. 548, 14 Law Reporter, 311; Yeo v. Yeo, 2 Dick. 498; Dickenson v. Mavie, 2 Ib. 582; Perishal v. Squire, 1 Ib. 31.

reason probably is that the occasions for its application are rare.<sup>1</sup> Returning now to the divorce suit, —

§ 915. *How the Doctrine is viewed in our Respective States:—*

**In Reason.**—The foregoing explanations show that this doctrine of temporary alimony is fundamental in the law, not only in the law of divorce, but in our entire legal system. It is not mere practice. Without the aid of any statute it is binding on our tribunals because inherent in natural justice and natural jurisprudence; because it is a part of our system of general law; because it was law in the ecclesiastical courts of England whence it travelled to our States.<sup>2</sup> Here are three distinct grounds upon any one of which, without the others, the doctrine would rest secure; much more, therefore, is it secure while resting on all three. But in a few of our States there have been on this subject misapprehensions which it required statutes to correct. Thus, —

§ 916. **In North Carolina,** — the statute being silent on the subject, the court refused temporary alimony and suit-money, not deciding whether or not if the husband was pursuing oppressively for divorce a wife without means, it would withhold relief until he furnished money for her defence.<sup>3</sup> Afterward legislation conferred the jurisdiction.<sup>4</sup>

§ 917. **In Vermont,** — the statute permitting permanent alimony, temporary alimony was without any particular consideration disallowed.<sup>5</sup> Later, the court intimated that it might be given.<sup>6</sup> Afterward a statute conferred the jurisdiction.<sup>7</sup>

<sup>1</sup> And see *Collins v. Collins*, 2 Paige, 9.

<sup>2</sup> Vol. I. § 116. And see *Griffin v. Griffin*, 47 N. Y. 134, 137; *Goldsmith v. Goldsmith*, 6 Mich. 285, 286; *Petrie v. P.* 40 Ill. 334. In illustration of a part of the doctrine of the text, it has been laid down that when a statute gives alimony it becomes an incident of the divorce suit, so that when another statute empowers a single judge to hear a divorce cause, it therefore permits him to adjudicate upon the alimony. *Jones v. Jones*, 18 Me. 308, 36 Am. D. 723.

<sup>3</sup> *Wilson v. Wilson*, 2 Dev. & Bat. 377. In this case Gaston, J. questioned the policy of temporary alimony. Upon which Chancellor Kent observes: "I am entirely convinced from my own judicial experience that such a discretion is prop-

erly confided to the courts." 2 Kent Com. 99, note.

<sup>4</sup> *Taylor v. Taylor*, 1 Jones, N. C. 528; *Shearin v. Shearin*, 5 Jones Eq. 233; *Little v. Little*, 63 N. C. 22; *Everton v. Everton*, 5 Jones, N. C. 202; *Sparks v. Sparks*, 69 N. C. 319; *Webber v. Webber*, 79 N. C. 572; *Scoggins v. Scoggins*, 80 N. C. 318; *Hodges v. Hodges*, 82 N. C. 122; *Miller v. Miller*, 75 N. C. 70; *Reeves v. Reeves*, 82 N. C. 348; *Lea v. Lea*, 104 N. C. 603.

<sup>5</sup> *Harrington v. Harrington*, 10 Vt. 505; *Hazen v. Hazen*, 19 Vt. 603.

<sup>6</sup> *LeBarron v. LeBarron*, 35 Vt. 365. In the Illinois case of *Petrie v. P.* 40 Ill. 334, it is distinctly said that this case overrules the two cases in the last note.

<sup>7</sup> *Nary v. Braley*, 41 Vt. 180.

§ 918. In **Massachusetts** — the authority was denied, until in 1855 it was expressly conferred by statute.<sup>1</sup>

§ 919. In **New Hampshire** — the court sometimes orders a small sum to be paid by the husband to a defending wife, to assist her in the defence. Beyond which, "it is contrary to the construction of the statute, settled by long and uniform practice," to allow temporary alimony.<sup>2</sup>

§ 920. In the other States, — not undertaking to say that there may not be a single exception, temporary alimony and suit-money — the two being alike in nature, resting on the same principle, and included in the same doctrine<sup>3</sup> — are awarded as under the law received by us from England, without statutory aid. Yet in many of the States, statutes have supplemented the unwritten rule. To particularize, this sort of allowance is held to be within the power of the courts in New York,<sup>4</sup> Michigan,<sup>5</sup> Kentucky,<sup>6</sup>

<sup>1</sup> Shannon v. Shannon, 2 Gray, 285. And see Coffin v. Dunham, 8 Cush. 404, 405, 54 Am. D. 769.

<sup>2</sup> Rowell v. Rowell, 63 N. H. 222, 225, opinion by Stanley, J.; Parsons v. Parsons, 9 N. H. 309, 319, 32 Am. D. 362; Quincy v. Quincy, 10 N. H. 272; Whipp v. Whipp, 54 N. H. 580. "If the wife is the libellant, and prevails, her expenses are usually considered in awarding her [permanent] alimony." Morris v. Palmer, 39 N. H. 123, 128.

<sup>3</sup> See ante, § 907; Dorsey v. Goodenow, Wright, 120; North v. North, 1 Barb. Ch. 241, 43 Am. D. 778; Coles v. Coles, 2 Md. Ch. 341; Tayman v. Tayman, 2 Md. Ch. 393. But in a Rhode Island case, an order for money to carry on the suit was refused on the ground of former practice, though it was intimated that temporary alimony was allowable. Sanford v. Sanford, 2 R. I. 64. Afterward the statutes authorized the courts to give suit-money. Thayer v. Thayer, 9 R. I. 377. And see Williams v. Monroe, 18 B. Monr. 514.

<sup>4</sup> North v. North, 1 Barb. Ch. 241. This decision is of special weight because the statute authorized an allowance to the wife to a certain extent, but it was held not to take away the common-law right where it was silent. Mix v. Mix, 1 Johns. Ch. 108. Of the like sort is Griffin v. Griffin, 47 N. Y. 134, holding, outside of the statutory provisions, that a wife who makes a successful defence to her hus-

band's nullity suit, may have her expenses and counsel fees beyond the taxable costs. Indeed, in New York, while there was no statute in terms empowering the court to give temporary alimony, it being simply provided that in every suit for divorce or separation the court may in its discretion require the husband to pay any sums necessary to enable the wife to carry on the suit during its pendency, the constant practice was to decree alimony *pendente lite*, in addition to this allowance for expenses of the suit. 2 Barb. Ch. Pract. 265. And see Forrest v. Forrest, 3 Bosw. 661; Kendall v. Kendall, 1 Barb. Ch. 610; Freeman v. Freeman, 8 Abb. N. Cas. 174.

<sup>5</sup> Story v. Story, Walk. Mich. 421. This decision was in 1844. By the Rev. Stats. of 1846, p. 333, the court may require the husband to pay any sums necessary to carry on or defend the suit during its pendency. Still it is held that without the help of the statute the court is authorized to require the husband to provide for the wife, as incident to the proceeding, both temporary alimony and suit-money. Goldsmith v. Goldsmith, 6 Mich. 285, 286. And see Cooper v. Mayhew, 40 Mich. 528; Lapham v. Lapham, 40 Mich. 527; Rossman v. Rossman, 62 Mich. 429.

<sup>6</sup> All the decisions reported were rendered while there were statutes more or less helpful to the same results. Fishli v. Fishli, 2 Litt. 337; Whitsell v. Whitsell,

Iowa,<sup>1</sup> New Jersey,<sup>2</sup> Missouri,<sup>3</sup> Georgia,<sup>4</sup> Pennsylvania,<sup>5</sup> Maine,<sup>6</sup> Illinois,<sup>7</sup> Alabama,<sup>8</sup> Wisconsin,<sup>9</sup> Nebraska,<sup>10</sup> Utah,<sup>11</sup> Virginia,<sup>12</sup> and Maryland.<sup>13</sup> To this list, not inquiring whether or not the common-law principle was in the States to be mentioned supplemented by a statute, we may add Arkansas,<sup>14</sup> California,<sup>15</sup> Indiana,<sup>16</sup>

8 B. Monr. 50; Thomas v. Thomas, 7 Bush, 665; Burgess v. Burgess, 1 Duv. 287.

<sup>1</sup> York v. York, 34 Iowa, 530. There is, at least now, an authorizing statute in this State. And see Small v. Small, 42 Iowa, 111; Champlin v. Champlin, 42 Iowa, 169; Prosser v. Prosser, 64 Iowa, 378; Clyde v. Peavy, 74 Iowa, 47.

<sup>2</sup> Amos v. Amos, 3 Green Ch. 171; Paterson v. Paterson, 1 Halst. Ch. 389.

<sup>3</sup> Ryan v. Ryan, 9 Misso 539. On looking for the statutes as they stood at this time, I find a provision for permanent alimony; also, that the court "may order any reasonable sum to be paid for the support of the wife during the pendency of her application for a divorce." Act of March 19, 1835, § 5; compare with Act of Feb. 28, 1845. Yet in Ryan v. Ryan, which was a suit by the husband, the defendant wife had alimony *pendente lite*. See, further, as to Missouri, Morton v. Morton, 33 Mo 614; Waters v. Waters, 49 Mo. 385; Mangels v. Mangels, 6 Mo. Ap. 481; Clarkson v. Clarkson, 20 Mo. Ap. 94; Dawson v. Dawson, 37 Mo. Ap. 207; S. v. Seddon, 93 Mo. 520; S. v. St. Louis Court of Appeals, 99 Mo. 216.

<sup>4</sup> McGee v. McGee, 10 Ga. 477; Gibson v. Patterson, 75 Ga. 549. And see Glenn v. Hill, 50 Ga. 94; Weaver v. Weaver, 33 Ga. 172; Sprayberry v. Merk, 30 Ga. 81, 76 Am. D. 637.

<sup>5</sup> Melizet v. Melizet, 1 Parsons, 77; Graves v. Cole, 19 Pa. 171; Waldron v. Waldron, 55 Pa. 231; Groves's Appeal, 68 Pa. 143; Banes v. Banes, 8 Philad. 250. And see Butler v. Butler, 1 Parsons, 329.

<sup>6</sup> Farwell v. Farwell, 31 Me. 591; Russell v. Russell, 69 Me 336.

<sup>7</sup> Petrie v. P. 40 Ill. 334; Newman v. Newman, 69 Ill 167; Jenkins v. Jenkins, 91 Ill. 167; Armstrong v. Armstrong, 35 Ill. 109; Blake v. P. 80 Ill. 11; Dinot v. Eigenmann, 80 Ill 274; Hunter v. Hunter,

100 Ill 477; Foss v. Foss, 100 Ill. 576; Raymond v. Raymond, 13 Bradw. 189; Wheeler v. Wheeler, 18 Bradw. 330; Lane v. Lane, 22 Ill. Ap. 529; Umlauf v. Umlauf, 22 Ill Ap. 580.

<sup>8</sup> Turner v. Turner, 44 Ala. 437; Jeter v. Jeter, 36 Ala. 391; and see Pearson v. Darrington, 32 Ala. 227; Richardson v. Richardson, 4 Port. 467, 480, 30 Am. D. 538; Harris v. Davis, 1 Ala. 259. The question is now in this State regulated by statute. Edwards v. Edwards, 80 Ala. 97.

<sup>9</sup> In re Gill, 20 Wis. 686; Williams v. Williams, 29 Wis. 517. And see Coad v. Coad, 40 Wis. 392; Phillips v. Phillips, 27 Wis. 252; Moe v. Moe, 39 Wis. 308; Helden v. Helden, 11 Wis. 554; Warner v. Heiden, 28 Wis. 517, 9 Am. R. 515.

<sup>10</sup> Callahan v. Callahan, 7 Neb. 38. There is now a statute on this subject. O'Brien v. O'Brien, 19 Neb. 584.

<sup>11</sup> Cast v. Cast, 1 Utah, 128.

<sup>12</sup> Purcell v. Purcell, 4 Hen. & Munf. 507, which was for alimony without divorce. Probably the same would be held in a divorce suit; later, a statute gives it. Cralle v. Cralle, 81 Va. 773.

<sup>13</sup> Ricketts v. Ricketts, 4 Gill, 105; Daiger v. Daiger, 2 Md. Ch. 335; Tayman v. Tayman, 2 Md. Ch. 393; Coles v. Coles, 2 Md. Ch. 341. See Stat. 1841, c. 262, which provides for permanent alimony only. In Wright's Case, 1 Bland, 101, note, which was a wife's suit for alimony without divorce, decided in 1730, she had, for her temporary aliment, one hundred pounds of tobacco per month. To the like effect is Soules v. Soules, 3 Grant U. C. Ch. 113.

<sup>14</sup> Glenn v. Glenn, 44 Ark. 46.

<sup>15</sup> White v. White, 73 Cal 105; Peyre v. Peyre, 79 Cal 336; Robinson v. Robinson, 79 Cal. 511; Turner v. Turner, 80 Cal. 141.

<sup>16</sup> Henderson v. Henderson, 110 Ind. 316.

Kansas,<sup>1</sup> Minnesota,<sup>2</sup> Colorado,<sup>3</sup> and Oregon.<sup>4</sup> So that either by statutory aid or without, temporary alimony and suit-money are universally grantable by our American courts.

§ 921. **Law or Equity.** — This being a fundamental right,<sup>5</sup> it is immaterial whether the divorce jurisdiction is in a court of law or of equity. For example, the Georgia divorce tribunal sits as a court of law, yet it deals with these questions precisely as though sitting in equity. Said Nisbet, J.: "*Alimony pendente lite* is a common-law right. It was an established right in England when we adopted the common law. It is no less a common-law right because it grew up under the usages of the Ecclesiastical Court. What becomes of that right in Georgia? The common law which guarantees it has not been repealed. It is suited to our condition, and in harmony with our institutions. We have no ecclesiastical court. The jurisdiction, which in England belonged to that court, has been transferred here by statute to the superior courts, and the manner of exercising it pointed out. Upon the subject of temporary alimony, however, our statutes are silent. Under this state of the facts, I repeat the question, What becomes of the right? . . . We think that with the power to grant divorces passed the power to enforce the common law which gives the wife temporary alimony."<sup>6</sup>

## II. *The Marriage on account of which the Temporary Alimony is given.*

§ 922. **Misapprehensions — Cases — (Not thought of).** — Under this sub-title, as under various other titles in every department of our law, we meet with cases in which the judges deciding them did not think of<sup>7</sup> some important and obvious thing essential to a correct result. So that either the language of the judge delivering the opinion became misleading, or the determination itself was wrong. The misleading matter under the present head consists chiefly of the occasional absence from the judicial mind of the reason on which this doctrine of temporary alimony mainly rests; namely, that the marriage has taken from the wife her

<sup>1</sup> *Earls v. Earls*, 26 Kan. 178.

<sup>2</sup> *Wagner v. Wagner*, 39 Minn. 394.

<sup>3</sup> *Cowan v. Cowan*, 10 Colo. 540.

<sup>4</sup> *Houston v. Timmerman*, 17 Or. 499.

<sup>5</sup> *Ante*, § 915.

<sup>6</sup> *McGee v. McGee*, 10 Ga. 477, 485.

<sup>7</sup> *Ante*, § 28, 66, 110, 113, 120, 134, 143, 150, 154, 168, 310.



property and vested it in the husband, leaving her when acting apart from or adversely to him in poverty. Hence, —

§ 923. **Doctrine defined.** — To justify an order for temporary alimony, there must have been a marriage either valid in fact or by the parties supposed to be valid, by reason whereof they have entered upon those mutual property relations which govern matrimonial cohabitation. Further than this it need not be good in law. Of course, —

§ 924. **Essential.** — A marriage of some sort, adapted to produce and therefore presumptively producing the consequence thus stated, must, as a foundation for temporary alimony, be either admitted or proved,<sup>1</sup> or there must be some entering upon the matrimonial relation.<sup>2</sup> But as the legal validity of the marriage is not essential to this preliminary order for the woman's support, so neither are the proofs of it required to be so conclusive as on a final decree for permanent alimony.<sup>3</sup> Now, —

§ 925. **In Nullity — (Marriage Void — Voidable).** — If parties enter upon cohabitation under a marriage which in fact is void, *a fortiori* under a voidable one, this reasoning shows that upon a suit between them to set it aside and declare it void there may be temporary alimony. Besides, within the doctrine of estoppels in marriage,<sup>4</sup> the husband who has asserted and acted upon the marital rights as to the wife's property, is, as against her, on this particular application for temporary support, estopped to deny the marriage. Not perhaps following this form of reasoning, but in some form conducting to the same result, the courts have generally held the mere *de facto* marriage to be adequate for temporary alimony and suit-money in the nullity suit, whether on the allegation that the marriage was void or that it was voidable.<sup>5</sup>

<sup>1</sup> *Miles v. Chilton*, 1 Rob. Ec. 684; *Smyth v. Smyth*, 2 Add. Ec. 254, 2 Eng. Ec. 293; *Purcell v. Purcell*, 4 Hen. & Munf. 507; *Durant v. Durant*, 1 Add. Ec. 114, 2 Eng. Ec. 43; *McGee v. McGee*, 10 Ga. 477, 488; *Wagner v. Wagner*, 6 Mo. Ap. 573; *Smith v. Smith*, 61 Iowa, 138. It is so also in Scotland. *Campbell v. Sassen*, 2 Wils. & S. 309; *Browne v. Burns*, 5 Scotch Sess. Cas. 2d ser. 1288; 1 *Fras. Dom. Rel.* 438.

<sup>2</sup> *Vreeland v. Vreeland*, 3 C. E. Green, 43.

<sup>3</sup> *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. R. 460.

<sup>4</sup> Vol. I. § 1150; ante, § 735; post. § 927.

<sup>5</sup> *Bird v. Bird*, 1 Lee, 209, 211, 5 Eng. Ec. 366; *Allen v. Allen*, 8 Abb. N. Cas. 175; *Miles v. Chilton*, 1 Rob. Ec. 684, 693; *North v. North*, 1 Barb. Ch. 241, 43 Am. D. 778; *Vandegrift v. Vandegrift*, 3 Stew. Ch. 76; *Vroom v. Marsh*, 2 Stew. Ch. 15; *Kline v. Kline*, 1 Philad. 383; *Portsmouth v. Portsmouth*, 3 Add. Ec. 63, 2 Eng. Ec. 428. And see *Griffin v. Griffin*, 47 N. Y. 134; *Collins v. Collins*, 80 N. Y. 1; *Starkweather v. Starkweather*, 29 Hun, 488; *Bowman v. Bowman*, 24 Ill. Ap. 165; *Wells v. Wells*, 3 Swab. & T.

And in many of the States, statutes either in direct terms or by implication have led to or confirmed this result.<sup>1</sup> The North Carolina one simply gives temporary alimony on the suit for divorce from "the bonds of matrimony or from bed and board." And this was held to include an application to declare null a void marriage, since in common-law language the nullity decree is a divorce from the marriage bond.<sup>2</sup>

§ 926. **Wife asserting Marriage void.** — We have cases wherein the judges, overlooking the reasons before explained, have laid it down that a wife who in her pleadings asserts the marriage to be void cannot have temporary alimony.<sup>3</sup> But this is not an averment that the marriage, though void, was not acted upon by the parties as good, or that it has not transferred to the man the property out of which she should have temporary support.<sup>4</sup> So that this allegation is nowise contradictory to her claim for temporary alimony and suit-money. The New York cases on this sort of question are uncertain and conflicting; for example, holding that the woman can<sup>5</sup> and that she cannot<sup>6</sup> have temporary alimony and suit-money on her nullity suit for the man's impotence. And in this State the question appears to be more or less complicated with special statutory terms.<sup>7</sup>

§ 927. **Distinction in Estoppels.** — It is above suggested<sup>8</sup> that a man who has taken from a woman her money, chattels, and the possession of her lands under the mutual understanding that the two have become husband and wife, is estopped to deny the marriage and its validity on her application for alimony pending a suit by either to declare the marriage void. For to deny, on

593. The Georgia Court decided the other way in *Roseberry v. Roseberry*, 17 Ga. 139; but in the subsequent case of *Frith v. Frith*, 18 Ga. 273, 63 Am. D. 289, the judge said the court "went too far" in the former, and I presume it is intended to be thereby overruled. Indeed, *Frith v. Frith* directly decides that when the husband seeks a decree of nullity against the wife on the ground of the marriage having been brought about by her fraud, she may have temporary alimony.

<sup>1</sup> For example, Con. Gen. Stats. of 1888, § 2813.

<sup>2</sup> *Lea v. Lea*, 104 N. C. 603, 605, 606. The like under the Illinois statute, *Brown v. Brown*, 18 Bradw. 445.

<sup>3</sup> *Griffin v. Griffin*, 47 N. Y. 134, 136; *North v. North*, 1 Barb. Ch. 241, 43 Am. D. 778.

<sup>4</sup> *Cray v. Cray*, 5 Stew. Ch. 25.

<sup>5</sup> *Allen v. Allen*, 59 How. Pr. 27, 8 Abb. N. Cas. 175.

<sup>6</sup> *Bartlett v. Bartlett*, Clarke, 460; *Bloodgood v. Bloodgood*, 59 How. Pr. 42.

<sup>7</sup> New York cases cited to the last and present sections; *Collins v. Collins*, 71 N. Y. 269, 10 Hun, 272; *Kennedy v. Kennedy*, 73 N. Y. 369, 372; *Kinzey v. Kinzey*, 7 Daly, 460; *Appleton v. Warner*, 51 Barb. 270; *Lee v. Lee*, 66 How. Pr. 207; *Smith v. Smith*, 1 Edw. Ch. 255.

<sup>8</sup> Ante, § 925.

this application, the marriage, and thus take away her right to live while the court is settling the question, would be a fraud upon her. But parties who, to accomplish some end other than real matrimony, have simply held themselves out as husband and wife, not deeming themselves to be such, however a form of marriage has been gone through with, their mutual property relations remaining those of unmarried persons, are not within the reasons for this interposition in behalf of the woman, and it should not be accorded.<sup>1</sup>

§ 928. **Court recommending Allowance.**—Under special circumstances, in advance of the proofs of the marriage and of the husband's faculties, there has been a suggestion from the bench leading to the wife's immediate relief. Thus, where a libel was admitted on the day preceding a long vacation, and the marriage and faculties could not be instantly shown, the court advised the husband to alimnt the wife during this vacation, "intimating that it should take this into the account when, in the progress of the suit, alimony *pendente lite* came to be regularly allotted, if its recommendation were not complied with."<sup>2</sup> In a later case of the like sort, the husband objected to so large a sum as the court proposed, and offered a smaller. "But," continues the report, "the court considered it too little, advised compliance with its recommendation, and strongly intimated that in the event of non-compliance the husband would have reason to repent it, when the formal allotment of alimony *pendente lite* came before the court after the long vacation."<sup>3</sup>

### III. *Other Prerequisites.*

§ 929. **Doctrine defined.**—When the adequate marriage of the last sub-title, the husband's faculties of the last chapter, the wife's needs, and allegations disclosing a *prima facie* ground of action or defence, appear in a cause, the court will commonly, but not as of

<sup>1</sup> Browne v. Burns, 5 Scotch Sess. Cas. 2d ser. 1288; Campbell v. Sassen, 2 Wils. & S. 309.

<sup>2</sup> Smyth v. Smyth, 2 Add. Ec. 254, 2 Eng. Ec. 293. See observations of Dr. Lushington on this case, in Miles v. Chilton, 1 Rob. Ec. 684, 693. See also Durant v. Durant, 1 Hag. Ec. 528, 3 Eng.

Ec. 231; Fraser v. Fraser, Poynter Mar. & Div. 248, note.

<sup>3</sup> Mitchell v. Mitchell, 1 Spinks, 102. In North Carolina this allowance seems even to have been made in advance of evidence or admissions of the marriage. Schonwald v. Schonwald, Phillips Eq. N. C. 215.

course, grant its order for the payment of temporary alimony. The leading particulars not already sufficiently explained are —

§ 930. **Wife's Needs.** — Since the means of livelihood are not always under the exclusive control of the husband, by reason of which the wife may require no alimony or only a small sum, the court will not grant a temporary decree until by admission or otherwise it becomes satisfied there is occasion therefor.<sup>1</sup> We have not much litigation of this question, and a *prima facie* presumption of her needs appears generally to be entertained.<sup>2</sup> But modern statutes have in many or most of our States given to the wife such privileges of separate property-holding as greatly to diminish this presumption; and in Michigan, for example, it does not prevail.<sup>3</sup> Again, —

§ 931. **Husband's Faculties.** — The faculties, or ability of the husband to respond to the order of the court, must be admitted or proved; this being essential both to his liability and to its amount.<sup>4</sup> There is often less formality in the proofs than on fixing permanent alimony at the close of the suit. We have a case in which the wife simply swore to her statement of his means,<sup>5</sup> — not objectionable if he does not contest it, but in reason inadequate if he does.

§ 932. **Adequate Pleadings.** — It would be vain to proceed with a suit wherein the pleadings of the parties failed to show ground in law for the relief sought. Therefore if the wife's petition or answer is without merits,<sup>6</sup> — as, if she is plaintiff, and sets out no adequate cause for divorce,<sup>7</sup> — she cannot have temporary alimony.<sup>8</sup> The rule in the former New York Court of Chancery was that the bill must be neither in form nor in substance obnoxious

<sup>1</sup> Ante, § 831; *Burgess v. Burgess*, 25 Ill. Ap. 525; *Maxwell v. Maxwell*, 28 Hun, 566; *Westerfield v. Westerfield*, 9 Stew. Ch. 195; *Rose v. Rose*, 53 Mich. 585; *Merritt v. Merritt*, 99 N. Y. 343.

<sup>2</sup> Post, § 935.

<sup>3</sup> *Ross v. Ross*, 47 Mich. 185.

<sup>4</sup> Ante, § 889; *Butler v. Butler*, 1 Lee, 38; *Goodall v. Goodall*, 2 Lee, 264, 6 Eng. Ec. 119; *Thornberry v. Thornberry*, 2 J. J. Mar. 322; *Jelineau v. Jelineau*, 2 Des. 45; *Wright v. Wright*, 3 Tex. 168, 179; *Stuart v. Stuart*, 123 Mass. 370; *Odom v. Odom*, 36 Ga. 286; *Phillips v. Phillips*, 4 Swab. & T. 129; *Forrest v. Forrest*, 8 Bosw. 640; *Burgess v. Bur-*

*gess*, 25 Ill. Ap. 525; *Becker v. Becker*, 15 Bradw. 247.

<sup>5</sup> *Gaylord v. Gaylord*, 4 Jones Eq. 74.

<sup>6</sup> *Worden v. Worden*, 3 Edw. Ch. 387; *Ballentine v. Ballentine*, 1 Halst. Ch. 471; *Jones v. Jones*, 2 Barb. Ch. 146; *Browne v. Burns*, 5 Scotch Sess. Cas. 2d ser. 1288; *Krause v. Krause*, 23 Wis. 354; *Boubon v. Boubon*, 3 Rob. N. Y. 715; *Walling v. Walling*, 1 C. E. Green, 389; *Weishaupt v. Weishaupt*, 27 Wis. 621.

<sup>7</sup> *Ward v. Ward*, 1 Tenn. Ch. 262; *Kennedy v. Kennedy*, 73 N. Y. 369.

<sup>8</sup> *Burrow v. Burrow*, 6 Lea, 499; *Friend v. Friend*, 65 Wis. 412; *Desbrough v. Desbrough*, 29 Hun, 592.

to a demurrer.<sup>1</sup> In principle, if the defect is only formal and is amendable, or if the question is a nice one of law requiring argument and deliberation, the just grounds for rejecting the application do not exist. And where, in Michigan, a husband answered the bill without demurring, the court on the wife's application for temporary alimony would not look into its sufficiency.<sup>2</sup> A wife whose pleadings admit her husband's adequate allegations to be true has no claim.<sup>3</sup>

§ 933. **Under the Ecclesiastical Practice**—formerly prevailing in England, the sufficiency of the wife's allegations is settled on their admission,<sup>4</sup> so that when the application for alimony is made this question has already been determined.

§ 934. **Jurisdiction.**—The pendency of a plea to the jurisdiction does not take from the court its power to make this allowance to the wife.<sup>5</sup> But not under all circumstances, pending this plea, will it be granted, — a question varying with the nature of the particular case.<sup>6</sup>

§ 935. **Almost of course.**—When an application is brought within the rules thus stated, the order will be made nearly as of course, and usually without inquiry into the merits of the cause.<sup>7</sup> In the ecclesiastical practice it was pretty strictly so; namely, the admission of the wife's pleadings showing her case to be *prima facie* good,<sup>8</sup> and her needs being *prima facie* apparent,<sup>9</sup> if then the marriage was admitted or proved, she was on establishing the husband's faculties entitled to the suit-money, termed costs, and the temporary alimony.<sup>10</sup> Still, —

<sup>1</sup> *Rose v. Rose*, 11 Paige, 166; *Wood v. Wood*, 2 Paige, 454; s. c. on appeal in the Court of Errors, 8 Wend. 357. The Vice-Chancellor granted temporary alimony where the husband had appealed to the Chancellor from an order allowing the sufficiency of the next friend. *Robertson v. Robertson*, 1 Edw. Ch. 360. See also *D'Arusmont v. D'Arusmont*, 14 Law Reporter, 311, 8 West. Law Jour. 548. But see, as perhaps variant from the doctrine of the text, *Coles v. Coles*, 2 Md. Ch. 341; as in accord with it, *Porter v. Porter*, 41 Missis. 116; *Phelan v. Phelan*, 12 Fla. 449.

<sup>2</sup> *Chaffee v. Chaffee*, 14 Mich. 463.

<sup>3</sup> *Scott v. Scott*, 17 Ind. 309.

<sup>4</sup> Ante, § 455.

<sup>5</sup> *Ronalds v. Ronalds*, Law Rep. 3 P.

& M. 259; *Bradstreet v. Bradstreet*, 6 Mackey, 502.

<sup>6</sup> *Bradstreet v. Bradstreet*, supra; *Mix v. Mix*, 1 Johns. Ch. 108. See *Turrel v. Turrel*, 2 Johns. Ch. 391; *Ex parte King*, 27 Ala. 387.

<sup>7</sup> *Wright v. Wright*, 1 Edw. Ch. 62; *Jones v. Jones*, 2 Barb. Ch. 146; *Hammond v. Hammond*, Clarke, 151; *Methvin v. Methvin*, 15 Ga. 97, 60 Am. D. 664; *Daiger v. Daiger*, 2 Md. Ch. 335; *Coles v. Coles*, 2 Md. Ch. 341; *Lishey v. Lishey*, 2 Tenn. Ch. 1; *Kelly v. Kelly*, 4 Swab. & T. 227; *Marker v. Marker*, 3 Stock. 256.

<sup>8</sup> Ante, § 933.

<sup>9</sup> Ante, § 930.

<sup>10</sup> *Butler v. Butler*, 1 Lee, 38, 5 Eng. Ec. 299; *Coote Ec. Pract.* 338; *Poynter Mar. & Div.* 247; *Oughton*, tit. 206.

§ 936. **Discretionary.** — This sort of allowance is, in this country, and probably everywhere, regarded, not as in all circumstances of strict right in the wife, but discretionary in the court;<sup>1</sup> that is, it is within the judicial discretion, wherein no judge is at liberty to act arbitrarily.<sup>2</sup> When exercised fairly and without abuse by the trial court, it will not ordinarily be interfered with on appeal. Yet it will be where substantial rights have been impaired, — a doctrine the precise limits of which in our States are not quite uniform.<sup>3</sup>

§ 937. **The Husband's Denial** — of the wife's allegation is no ground for refusing her temporary alimony. It is the object of the litigation to ascertain on which side is the truth.<sup>4</sup> Even a verdict against her, while the cause has not progressed to its final hearing,<sup>5</sup> or against the alleged paramour in an action of criminal conversation brought by the husband,<sup>6</sup> will not defeat this allowance.

§ 938. **Drunkenness,** — in the wife, will not disqualify her to have suit-money and temporary alimony. But the court, on giving the alimony, will take care that it be not misapplied.<sup>7</sup>

§ 939. **Ill Faith in the Wife,** — for example, where she is prosecuting her suit for some collateral purpose,<sup>8</sup> will lead the court to withhold this decree, or to grant it under restrictions.<sup>9</sup> But in reason, if her pleadings show no lack of good faith, and she

<sup>1</sup> *Wagner v. Wagner*, 39 Minn. 394; *Cooper v. Mayhew*, 40 Mich. 528; *O'Brien v. O'Brien*, 19 Neb. 584; *Jones v. Jones*, 2 Barb. Ch. 146; *Mix v. Mix*, 1 Johns. Ch. 108; 1 *Fras. Dom. Rel.* 441; *Swearingen v. Swearingen*, 19 Ga. 265; *Dicken v. Dicken*, 38 Ga. 663; *Marker v. Marker*, 3 Stock. 256; *Hill v. Hill*, 47 Ga. 332.

<sup>2</sup> Vol. I. § 709, 1837; *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178; *Turner v. Turner*, 80 Cal. 141

<sup>3</sup> *Besore v. Besore*, 49 Ga. 378; *Carlton v. Carlton*, 44 Ga. 216; *Hecht v. Hecht*, 28 Ark. 92; *DeLlamosas v. DeLlamosas*, 62 N. Y. 618; *Kennedy v. Kennedy*, 73 N. Y. 369; *Haines v. Haines*, 35 Mich. 138; *Jenkins v. Jenkins*, 91 Ill. 167; *Newman v. Newman*, 69 Ill. 167; *Lapham v. Lapham*, 40 Mich. 527; *Williams v. Williams*, 29 Wis. 517; *Buckles v. Buckles*, 81 Ind. 159; *Henderson v. Henderson*, 110 Ind. 316; *Lane v. Lane*, 22 Ill. Ap. 529; *Foss v. Foss*, 100 Ill. 576; *Rossman v. Rossman*, 62 Mich. 429;

*Wooley v. Wooley*, 24 Ill. Ap. 431. **Imperative.** — We have one or more States in which the statutes make the allowance imperative, and take away the judicial discretion. *Whitsell v. Whitsell*, 8 B. Monr. 50.

<sup>4</sup> *McGee v. McGee*, 10 Ga. 477, 489; *Hammond v. Hammond*, Clarke, 151. And see *Campbell v. Campbell*, 73 Iowa, 482.

<sup>5</sup> *D'Oyley v. D'Oyley*, 4 Swab. & T. 226; *Wells v. Wells*, 3 Swab. & T. 542; *Stanford v. Stanford*, 1 Edw. Ch. 317; *Germond v. Germond*, 1 Paige, 83; *Noblett v. Noblett*, Law Rep. 1 P. & M. 651.

<sup>6</sup> *Williams v. Williams*, 3 Barb. Ch. 628.

<sup>7</sup> *Saunders v. Saunders*, 2 Edw. Ch. 491.

<sup>8</sup> Ante, § 433.

<sup>9</sup> *Glasser v. Glasser*, 1 Stew. Ch. 22; *Rogers v. Rogers*, 4 Swab. & T. 82; *Vandegrift v. Vandegrift*, 3 Stew. Ch. 76, 77; *Zeigenfuss v. Zeigenfuss*, 21 Mich. 414; *Kock v. Kock*, 42 Barb. 515, 516.

makes no admissions against it, the question will commonly be one of the issues for the trial, and the judge should not cast in the impediment of an adverse order on the alimony application. Hence, —

§ 940. **Looking into the Merits** — of a case, by affidavits, and beyond what appears in the pleadings, preliminarily to an award of temporary alimony and suit-money, is, as a general rule, contrary to just principle, and contrary to the practice of most courts. Yet we have tribunals in which this sort of procedure is more or less permitted.<sup>1</sup>

§ 941. **A Lunatic Husband**, — made defendant in a divorce suit,<sup>2</sup> is, in reason, under the same liability to aliment his wife as a sane one; for he is equally bound to supply her with necessaries.<sup>3</sup> Yet we have a case wherein, because of this reason not occurring to the court,<sup>4</sup> and of its misapprehension of the true ground of this allowance, the contrary was held. Said the learned Chancellor: "The order implies a default and neglect of a moral obligation on the part of the defendant. This ought not to be imputed to a lunatic. The embarrassment in enforcing such an order is also an objection to making it."<sup>5</sup> Surely if the law permits an insane husband to be sued for a divorce, defending through his guardian, it consequently requires the guardian in proper circumstances to aliment the wife out of the ward's property in his hands.

§ 942. **Wife not directing Cause**. — If the court has suspicion that the wife is not herself directing her cause, but that others are carrying it on unmoved by her, this should be inquired into before an order for temporary alimony is made.<sup>6</sup>

§ 943. **Appearance and Issue**. — The foregoing prerequisites to the allowance cannot transpire, therefore it cannot be made, until

<sup>1</sup> Consult and compare the cases cited to the last section and *Dougherty v. Dougherty*, 4 Halst. Ch. 540; *Martin v. Martin*, 4 Halst. Ch. 563; *Anthony v. Anthony*, 3 Stock. 70; *Marker v. Marker*, 3 Stock. 256; *Vandegrift v. Vandegrift*, 3 Stew. Ch. 76; *Ballentine v. Ballentine*, 1 Halst. Ch. 471; *Begbie v. Begbie*, 3 Halst. Ch. 98; *Glasser v. Glasser*, 1 Stew. Ch. 22; *Countz v. Countz*, 30 Ark. 73; *Monk v. Monk*, 7 Rob. N. Y. 153; *Edwards v. Edwards*, Wright, 308; *Wooley v. Wooley*, Wright, 245; *D'Arusmont v. D'Arusmont*,

8 West. Law Jour. 548, 14 Law Reporter, 311; *Slack v. Slack*, Dudley, Ga. 165; *McGee v. McGee*, 10 Ga. 477; *Wright v. Wright*, 3 Tex. 168; *Longfellow v. Longfellow*, Clarke, 344. And see post, § 943, note, 944.

<sup>2</sup> Ante, § 518-522.

<sup>3</sup> Vol. I. § 1253.

<sup>4</sup> Ante, § 922, and places there referred to.

<sup>5</sup> *McEwen v. McEwen*, 2 Stock. 286.

<sup>6</sup> *Swearingen v. Swearingen*, 19 Ga. 265.

both parties are by due appearance before the court,<sup>1</sup> and the case has so far travelled toward an issue<sup>2</sup> as to present in allegation a due foundation for the order.<sup>3</sup> But the claim of a wife to support during the pendency of her divorce suit against the husband in no way depends on the sort of defence he proposes, therefore his answer to her libel is not among the prerequisites to her alimony.<sup>4</sup> Nor is a defending wife's answer to the husband's accusation a prerequisite, and for the like reason.<sup>5</sup>

§ 944. **Separation and Dissolution distinguished.**—In reason, this question is the same whether the divorce sought is from bed and board or from the marriage bond.<sup>6</sup> But the New York Court of Chancery made a difference; in the dissolution suit, awarding to the wife her allowance as of course if she duly set out on oath a ground of action or defence. But in the suit for separation, if each party stated a good case on oath, yet resulting in a strong impression in the court that the husband was the one more injured, the wife was not accorded her allowance unless she further satisfied it of the merits of her cause.<sup>7</sup> This unreasoning distinction, without recognition elsewhere,<sup>8</sup> appears to have come from interpretations of the statutes of this State.<sup>9</sup>

<sup>1</sup> *Tomkins v. Tomkins*, 1 Swab. & T. 163; *Simmons v. Simmons*, Phillips Eq. N. C. 63; *Smyth v. Smyth*, 2 Add. Ec. 254, 2 Eng. Ec. 293; *Holland v. Holland*, 4 Houst. 86.

<sup>2</sup> Ante, § 641–653.

<sup>3</sup> Under the Georgia statute, *Yoemans v. Yoemans*, 77 Ga. 124.

<sup>4</sup> *Tomkins v. Tomkins*, supra. And see *Weishaupt v. Weishaupt*, 27 Wis. 621.

<sup>5</sup> *Smith v. Smith*, 4 Swab. & T. 228. "During the first year of my presiding in this court," said Sir C. Cresswell in this case, "I think I must have decided in some fifty cases that a wife, when she applies for alimony *pendente lite*, must be considered as innocent. Those decisions were in accordance with the practice of the Ecclesiastical Court. There was no appeal from them." **New York.**—The old Court of Chancery in New York would not order the allowance to a defending wife until by her answer she had disclosed the nature of her defence. *Lewis v. Lewis*, 3 Johns. Ch. 519; *s. p. Allen v. Allen*, Hemp. 58. And contrary to the wholesome provision of our entire juris-

prudence that no one shall be denied a right for refusing to criminate himself, the court compelled her, on the accusation of adultery, to make oath to her denial, or have neither alimony nor suit-money; though for no other purpose was a defendant's answer required to be on oath. But for the purpose of the application, this sworn-to answer was accepted as conclusive. *Williams v. Williams*, 3 Barb. Ch. 628; *Osgood v. Osgood*, 2 Paige, 621; *Wood v. Wood*, 2 Paige, 108. If on information and belief she set up recrimination in answer, she must bring forward affidavits to it as a prerequisite to the allowance. *Osgood v. Osgood*, supra, and see *Clark v. Clark*, 7 Rob. N. Y. 284.

<sup>6</sup> Post, § 954.

<sup>7</sup> *Bissell v. Bissell*, 1 Barb. 430. And see *Worden v. Worden*, 3 Edw. Ch. 387; *Hollerman v. Hollerman*, 1 Barb. 64. And compare with *Osgood v. Osgood*, 2 Paige, 621. See also *Jones v. Jones*, 2 Barb. Ch. 146; *Snyder v. Snyder*, 3 Barb. 621, 624.

<sup>8</sup> See *Portsmouth v. Portsmouth*, 3 Add. Ec. 63, 2 Eng. Ec. 428.

<sup>9</sup> It will suffice to cite some of the fur-



IV. *The Amount.*

§ 945. **Elsewhere.** — The doctrine of temporary alimony is closely connected with that of permanent, and in the main it is governed by the same principles. So that in the chapter after the next, where we consider the latter, more or less of what would be appropriate under the present sub-title appears. Still, as to the amount, —

§ 946. **Justice to Wife — Needful Help.** — Permanent alimony, awarded after a judicial determination that the wife has been wronged by the husband, is not only a maintenance to her, but to some extent a compensation. Yet temporary alimony is simply the support which the husband should render the wife during a necessary temporary separation, while so far there is neither evidence nor presumption that he is guilty of any delinquency.

§ 947. **Discretionary.** — In amount, the same as in other respects,<sup>1</sup> this temporary alimony is regulated by the judicial discretion.<sup>2</sup> As a guide to the discretion, the following are the principal —

§ 948. **Special Considerations.** — It is important to consider that the husband has to pay the expenses of the suit on both sides.<sup>3</sup> And while his duty is to maintain the wife according to his rank and fortune,<sup>4</sup> and in the words of Sir John Nicholl, speaking to particular facts, “with some reference to her former comfortable state, yet with moderation,”<sup>5</sup> the bringing of the accusation casts over her a shadow which should cause her to live in comparative seclusion and consequent economy until it is removed.<sup>6</sup> “On that account,” said this learned judge, “a comparatively small allotment is given during the pendency of the suit.”<sup>7</sup> Again, —

§ 949. **Special to Case.** — While thus temporary alimony, considered apart from suit-money, will commonly be less than permanent, all relevant facts special to the particular case should

ther cases. *Laurie v. Laurie*, 9 Paige, 234; *Shore v. Shore*, 2 Sandf. 715, 8 N. Y. Leg. Obs. 166; *Meldora v. Meldora*, 4 Sandf. 721; *Thomas v. Thomas*, 18 Barb. 149; *Wood v. Wood*, 8 Wend. 357.

<sup>1</sup> Ante, § 936.

<sup>2</sup> *Campbell v. Campbell*, 67 Ga. 423.

<sup>3</sup> *Brisco v. Brisco*, 2 Hag. Con. 199,

201; *Harris v. Harris*, 1 Hag. Ec. 351, 3 Eng. Ec. 153.

<sup>4</sup> Vol. I. § 1188, 1189.

<sup>5</sup> *Smith v. Smith*, 2 Phillim. 152, 1 Eng. Ec. 220.

<sup>6</sup> *Hawkes v. Hawkes*, 1 Hag. Ec. 526, 3 Eng. Ec. 230.

<sup>7</sup> *Rees v. Rees*, 2 Phillim. 387, 1 Eng. Ec. 418; *Morrell v. Morrell*, 2 Barb. 480.

be taken into the account in fixing the sum.<sup>1</sup> Not quite without liability to be questioned, as explanations in the last sub-title will show, it has been diminished by the husband's sworn denial of the wife's charge.<sup>2</sup> And a wife prosecuting a suit is generally understood to have a better claim than an accused one defending,<sup>3</sup> — another proposition not absolutely clear in reason. Moreover, —

§ 950. **In Reason**, — temporary alimony should be less a proportion of the income, and more a provision for the actual but diminished<sup>4</sup> needs of the wife, than permanent.<sup>5</sup> On a view not altogether unlike this, —

§ 951. **Limitation in New York**. — Under the old New York practice, the new not disclosing much on this subject, a wife proceeding against her husband was in general allowed no more than would supply her actual wants. The reason given for this rule was to discourage vexatious suits and other like abuses, and to prevent indiscreet friends from fomenting family quarrels.<sup>6</sup> A yet stronger claim to favor is its admirable equity when with it another rule sometimes resorted to in this State is permitted to operate; namely, to let the permanent alimony commence from the date of the suit, deducting from it the temporary, already paid by the husband.<sup>7</sup> Still, —

§ 952. **The Common Rule** — in England and most of our States is to allow for temporary alimony about one fifth of the joint income, deducting the wife's separate income. Yet it is subject to be varied with the circumstances.<sup>8</sup> When the necessities and

<sup>1</sup> *Kempe v. Kempe*, 1 Hag. Ec. 532, 3 Eng. Ec. 233; *Otway v. Otway*, 2 Phillim. 109, 1 Eng. Ec. 203; *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178; *McGee v. McGee*, 10 Ga. 477, 490; *Hawkes v. Hawkes*, 1 Hag. Ec. 526, 3 Eng. Ec. 230.

<sup>2</sup> *Story v. Story*, Walk. Mich. 421. See *Llamosas v. Llamosas*, 4 Thomp. & C. 574.

<sup>3</sup> *Amos v. Amos*, 3 Green Ch. 171; *Shelf. Mar. & Div.* 590.

<sup>4</sup> Ante, § 948.

<sup>5</sup> *Umlauf v. Umlauf*, 22 Ill. Ap. 580. And see *Cralle v. Cralle*, 81 Va. 773; *Potts v. Potts*, 68 Mich. 492.

<sup>6</sup> *Germond v. Germond*, 4 Paige, 643; *Lawrence v. Lawrence*, 3 Paige, 267. A like course of reasoning is adopted in

*Poynter Mar. & Div.* 250. But in New York, where a husband was worth \$200,000, the court ordered him to pay the wife, who was plaintiff, one hundred dollars per month for temporary alimony, besides a gross sum of \$250 toward carrying on her suit. *Denton v. Denton*, 1 Johns. Ch. 364. In *Forrest v. Forrest*, 5 Bosw. 672, the wife's temporary alimony was raised from \$200 to \$250 per month. And see *Mix v. Mix*, 1 Johns. Ch. 108; *Collins v. Collins*, 2 Paige, 9; *Wright v. Wright*, 1 Edw. Ch. 62; *Worden v. Worden*, 3 Edw. Ch. 387; *Kirby v. Kirby*, 1 Paige, 261.

<sup>7</sup> Post, § 963.

<sup>8</sup> *Hawkes v. Hawkes*, 1 Hag. Ec. 526, 3 Eng. Ec. 230; *Brisco v. Brisco*, 2 Hag. Con. 199, 201; *Rees v. Rees*, 3 Phillim.

claims of the wife have been large, one fourth has been allotted.<sup>1</sup> And Sir John Nicholl, in one case, where the husband had undertaken to put his property out of his hands, granted her £50 per year out of an income of £140, and refused to direct the motion not to issue until after fifteen days, observing that the wife of such a person as the husband "could not maintain herself decently for less than fifty pounds per annum."<sup>2</sup> On the other hand, in different circumstances, the wife has had as small a proportion as one eighth.<sup>3</sup>

§ 953. **Large or Small Income.** — It results from views already stated<sup>4</sup> that ordinarily the proportion awarded from a small income should be greater than from a large. And such appears to be the judicial rule. The ground for it was once said to be that, though it is not so in permanent alimony, "there may be good reasons for giving less where the question is on alimony during the suit, when the wife is to live in seclusion and wants a mere subsistence."<sup>5</sup>

§ 954. **With us — (Similitudes and Differences.)** — The foregoing expressions and illustrations of the doctrine are chiefly English, and largely from the ecclesiastical courts. The fact that the suit in most of those cases was for separation cannot in reason diminish their effect as precedents in dissolution suits, since in either the question relates to the support of the wife while the marriage is subsisting.<sup>6</sup> Most of our courts appear to have followed, in effect, the English, though our decisions are somewhat less distinct as to a precise proportion of the joint income to be given the wife. A simple citation of representative American cases, with a few more English ones, will impart all the further in-

387, 1 Eng. Ec. 418; *Hayward v. Hayward*, 1 Swab. & T. 85; *Williams v. Williams*, 29 Wis. 517.

<sup>1</sup> *Finlay v. Finlay*, Milward, 575; *Irwin v. Dowling*, Milward, 629.

<sup>2</sup> *Brown v. Brown*, 2 Hag. Ec. 5, 7, 4 Eng. Ec. 11, 12. Where the income was £250, and the husband had two children to maintain and educate, the wife was allowed £75. "She must have the means of furnishing herself with a decent subsistence." *Harris v. Harris*, 1 Hag. Ec. 351, 3 Eng. Ec. 153. Where a large proportion of the estate came from the wife, who was the complainant, and the general

complexion of the case was favorable to her, she was allowed £200 in addition to her own private income of £300, making £500, while the income of the husband was £1,500, — between one third and one fourth of the joint income. *Smith v. Smith*, 2 Phillim. 152, 1 Eng. Ec. 220.

<sup>3</sup> *Butler v. Butler*, Milward, 629. Here she was allowed £50 out of an income of £400.

<sup>4</sup> Ante, § 950.

<sup>5</sup> Sir John Nicholl, in *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178. And compare with ante, § 948.

<sup>6</sup> Compare with ante, § 944.

formation under this head possible without consuming too much space.<sup>1</sup>

### V. *The Beginning and Termination of the Temporary Alimony.*

§ 955. **When Application — (Suit-Money).** — The rules on this question appear to be the same in temporary alimony and in suit-money. We have seen at what stage of the cause the application will be too early.<sup>2</sup> On the other hand, when, the litigation being over, the wife's needs are ended, it will be too late.<sup>3</sup> For her protection, the court will not allow the husband's suit to be dismissed in disregard of her claims to this provision;<sup>4</sup> but if it is dismissed, the wife will lose her allowance even though her petition for it is on the files.<sup>5</sup> Yet the order may be made even on the final hearing.<sup>6</sup> And the application is not necessarily too late after a decree *nisi*,<sup>7</sup> or an appeal. So that —

§ 956. **The Rule,** — in the absence of adverse terms in the statute, or an adverse interpretation of its effect, is that while the wise and matter-of-course time to make the application for temporary alimony and suit-money is immediately on the case being ripe therefor, it is permissible at any stage of the proceeding either before or after a verdict or an appeal.<sup>8</sup> But —

<sup>1</sup> Potts v. Potts, 68 Mich. 492; Atkins v. Atkins, 13 Neb. 271; Schammel v. Schammel, 74 Cal. 36; Sharon v. Sharon, 75 Cal. 1; McConahey v. McConahey, 21 Neb. 463; Raymond v. Raymond, 13 Bradw. 189; Edwards v. Edwards, 84 Ala. 361; Llamosas v. Llamosas, 4 Thomp. & C. 574; Prescott v. Prescott, 65 Me. 478; Briggs v. Briggs, 36 Iowa, 383; Cravens v. Cravens, 4 Bush, 435; Vroom v. Marsh, 2 Stew. Ch. 15; Brown v. Brown, 3 Swab. & T. 217; Harrell v. Harrell, 39 Ind. 185; Williams v. Williams, 29 Wis. 517; Bird v. Bird, 1 Lee, 418, 5 Eng. Ec. 396; Amos v. Amos, 3 Green Ch. 171; Paterson v. Paterson, 1 Halst. Ch. 389; Purcell v. Purcell, 4 Hen. & Munf. 507; D'Arusmont v. D'Arusmont, 14 Law Reporter, 311, 8 West. Law Jour. 548; McGee v. McGee, 10 Ga. 477, 491; Coles v. Coles, 2 Md. Ch. 341; Collins v. Collins, 29 Ga. 517; Weber v. Weber, 1 Swab. & T. 219.

<sup>2</sup> Ante, § 935, 943.

<sup>3</sup> Wagner v. Wagner, 34 Minn. 441;

Dunn v. Dunn, 13 P. D. 91; Newman v. Newman, 69 Ill. 167.

<sup>4</sup> Twisleton v. Twisleton, Law Rep. 2 P. & M. 339, 1 Eng. Rep. 260.

<sup>5</sup> Wilde v. Wilde, 2 Nev. 306; McCulloch v. Murphy, 45 Ill. 256; Twisleton v. Twisleton, supra; Chestnut v. Chestnut, 77 Ill. 346. See Waters v. Waters, 49 Mo. 385; Rolt v. Rolt, 3 Swab. & T. 604.

<sup>6</sup> Dinot v. Pfirshing, 86 Ill. 83; Pritchard v. Pritchard, 4 Abb. N. Cas. 298; Jeter v. Jeter, 36 Ala. 391; Kirk v. Kirk, 3 Scotch Sess. Cas. 4th ser. 128; Shy v. Shy, 7 Heisk. 125; Frankfort v. Frankfort, 3 Curt. Ec. 715; Melizet v. Melizet, 1 Parsons, 77. And see Burgess v. Burgess, 1 Duv. 287.

<sup>7</sup> Ellis v. Ellis, 8 P. D. 188 (overruling Latham v. Latham, 2 Swab. & T. 299); Brigham v. Brigham, 147 Mass. 159.

<sup>8</sup> Helden v. Helden, 11 Wis. 554; Blake v. Blake, 70 Ill. 618; Call v. Call, 65 Me. 407; Moe v. Moe, 39 Wis. 308; Jones v. Jones, Law Rep. 2 P. & M. 333; Nich-

§ 957. **Appeal — Opening Decree.** — In some of our States, this question of temporary alimony is under the statutes deemed to be within the sole jurisdiction of the trial court, so the application cannot be heard when first made in the higher tribunal on appeal.<sup>1</sup> In other States and otherwise the appeal does not end the cause, and the wife may have her allowance on application afterward made.<sup>2</sup> Likewise statutes will complicate themselves with the question of this allowance on the opening of a decree and a subsequent hearing.<sup>3</sup> Within the foregoing principles, —

§ 958. **Varied.** — This allowance may be increased or diminished during the progress of the suit.<sup>4</sup> While such is the strict law, —

§ 959. **An Early Application** — is important for practical reasons.<sup>5</sup> The advantages to the wife are obvious. They are equally so to the husband; since, as explained in a preceding chapter,<sup>6</sup> an allowance made by the court and paid by him will protect him against any debt which she may contract on his account.<sup>7</sup> In the absence whereof, —

§ 960. **Husband's Liability.** — During a divorce suit the husband is liable the same as though it were not in progress, to any third person who may supply the wife with necessaries, he not having provided them himself.<sup>8</sup> Even where she is plaintiff charging desertion, if in good faith she offers to renew the cohabitation and he declines, her proposal will be construed to include the withdrawal of the suit, and his liability to a third person will

olson v. Nicholson, 3 Swab. & T. 214; Anonymous, 15 Abb. Pr. n. s. 307; Jenkins v. Jenkins, 91 Ill. 167; Strong v. Strong, 5 Rob. N. Y. 612; Goldsmith v. Goldsmith, 6 Mich. 285; Leslie v. Leslie, 11 Abb. Pr. n. s. 311; Coad v. Coad, 40 Wis. 392.

<sup>1</sup> Hunter v. Hunter, 100 Ill. 477; Reilly v. Reilly, 60 Cal. 624. See Cralle v. Cralle, 81 Va. 773; S. v. St. Louis Court of Appeals, 99 Mo. 216; Ex parte Ambrose, 72 Cal. 398; Butler v. Butler, 15 P. D. 13.

<sup>2</sup> Chaffee v. Chaffee, 14 Mich. 463; Clarkson v. Clarkson, 20 Mo. Ap. 94.

<sup>3</sup> Wilson v. Wilson, 49 Iowa, 544; Smith v. Smith, 3 Or. 363; McFarland v. McFarland, 51 Iowa, 565.

<sup>4</sup> Leslie v. Leslie, 11 Abb. Pr. n. s. 311; Waters v. Waters, 49 Mo. 385; Hopkins v. Hopkins, 40 Wis. 462; Coad v. Coad, 40 Wis. 392; Williams v. Williams, 29 Wis. 517.

<sup>5</sup> Brisco v. Brisco, 2 Hag. Con. 199.

<sup>6</sup> Ante, § 838.

<sup>7</sup> In a case which well illustrates the advantages to the husband, Lord Stowell observed: "Under all these circumstances, where enormous expenses are thrown upon the husband in every mode to which female extravagance can apply itself, if the court did not feel that by ordering alimony it was most consulting the protection of the husband, it would hardly be disposed to allot any alimony at all. Under all considerations, however, the court allots the sum of £200 per annum in addition to the sum of £200 per annum pin-money." Brisco v. Brisco, 2 Hag. Con. 199, 202. And see 1 Fras. Dom. Rel. 441.

<sup>8</sup> Keegan v. Smith, 5 B. & C. 375; Sykes v. Halstead, 1 Sandf. 483; Dowe v. Smith, 11 Allen, 107; Johnston v. Allen, 39 How. Pr. 506. See Catlin v. Martin, 69 N. Y. 393.

appear without opening the question of the original alleged desertion.<sup>1</sup> Though the temporary alimony is by the order to commence at a period anterior to a debt contracted by the wife, and the husband pays the alimony, his liability to the third person is not thereby taken away.<sup>2</sup> As some amelioration of this hardship, —

§ 961. **Already paid for Wife.** — The court in fixing the temporary alimony will deduct the sums which the husband has paid on the wife's account since the date to which the order extends back, treating them as in part payment.<sup>3</sup>

§ 962. **When commence.** — The time for the commencement of temporary alimony should not be confounded with that for the application. The ecclesiastical courts had the rule, which in the average case appears to be just in principle, that its commencement be from the return of the citation; <sup>4</sup> “for, till then, the wife may be considered as able to obtain subsistence on the credit of her husband.” <sup>5</sup> But the judge had the discretion to make its beginning earlier or later, — earlier, as from the date of the citation, where the husband is promoter and he does not use due diligence in its return; <sup>6</sup> later, as where the wife had a separate income of £300 per year, and it was two years before she applied for the alimony. In this case the court of appeal directed it to commence from the date of the decree below.<sup>7</sup> To render this exposition plain, we must anticipate matter within a chapter further on as to the —

§ 963. **Beginning of Permanent Alimony.** — The permanent alimony may when just and reasonable — so, at least, it is held in New York — be made by the decree to begin back at the commencement of the suit; <sup>8</sup> though ordinarily the time is from the date of the sentence.<sup>9</sup> In an Upper Canada case, where the com-

<sup>1</sup> *Cunningham v. Irwin*, 7 S. & R. 247, 10 Am. D. 458.

<sup>2</sup> *Keegan v. Smith*, 5 B. & C. 375; 2 Bright Hus. & Wife, 19; *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. D. 421; *Dove v. Smith*, 11 Allen, 107.

<sup>3</sup> *Hamerton v. Hamerton*, 1 Hag. Ec. 23, 3 Eng. Ec. 17; *Harris v. Harris*, 1 Hag. Ec. 351, 3 Eng. Ec. 153. And see *Coles v. Coles*, 2 Md. Ch. 341.

<sup>4</sup> *Hamerton v. Hamerton*, 1 Hag. Ec. 23, 3 Eng. Ec. 17; *Bain v. Bain*, 2 Add. Ec. 253, 2 Eng. Ec. 293.

<sup>5</sup> *Loveden v. Loveden*, 1 Phillim. 208.

<sup>6</sup> *Loveden v. Loveden*, supra.

<sup>7</sup> *Rees v. Rees*, 3 Phillim. 387, 1 Eng. Ec. 418.

<sup>8</sup> *Forrest v. Forrest*, 25 N. Y. 501, 514, 517, 518; *Forrest v. Forrest*, 3 Bosw. 661; *Burr v. Burr*, 7 Hill, N. Y. 207. In this case, temporary alimony had been ordered and paid; and the court directed that the amount so paid be deducted from the permanent alimony. But see *Ricketts v. Ricketts*, 4 Gill, 105. And see ante, § 951.

<sup>9</sup> *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178; *Kempe v. Kempe*, 1 Hag. Ec. 532, 3 Eng. Ec. 233; *Durant v. Durant*, 1 Hag. Ec. 528, 3 Eng. Ec. 231.

plaining wife had neglected to apply for temporary alimony, the court still would not permit the permanent to begin earlier than the date of the decree. "The cases," said the Vice-Chancellor, "show, I think conclusively, that in England permanent alimony is not granted till sentence or decree."<sup>1</sup> In principle, there is no real difference between temporary alimony and permanent. If, as the doctrine pretty plainly is, the temporary alimony may be awarded at the final decree, to commence with the bringing of the suit, and the permanent alimony also may be awarded then, the decree may be for alimony beginning with the suit and continuing onward indefinitely. To cut it into two parts, attaching to them respectively the adjectives "temporary" and "permanent," would seem to be superfluous.

§ 964. **Permanent Alimony after Appeal.**—If in the ecclesiastical practice there was an appeal, the permanent alimony of the appellate tribunal began, not from the date of its sentence, but from that of the sentence below. For as the appeal suspended the original sentence, if this was not the rule there would be an interval when the wife would have no maintenance. Yet if she was chargeable with laches in prosecuting her appeal, the alimony dated from the return of the inhibition.<sup>2</sup>

§ 965. *The Doctrine of this Chapter restated.*

During a divorce litigation, the merits of the parties are problematical. Where the suit is fairly and properly brought, the law knows only that the plaintiff has the right to prosecute it and the defendant to defend it. If the wife has an adequate income apart from her husband, she must bear her own burden of expense, yet in no case is she required to afford pecuniary help to the husband. If either she has no separate income or an inadequate one, the husband must contribute what under the particular circumstances is just. The whole question is regulated by the judicial—not the arbitrary—discretion of the court, for the guidance whereof natural reason, judicial precedent, and the wife's actual necessities, blend. But as of right, not of judicial discretion, a man can refuse alimony to a woman to whom he is neither married, nor bound by an estoppel in the semblance of marriage.

<sup>1</sup> *Soules v. Soules*, 3 Grant Ch., U. C. 113.

<sup>2</sup> *Loveden v. Loveden*, 1 Phillim. 208.

<sup>115</sup>. See *Daniels v. Lindley*, 44 Iowa, 567.

## CHAPTER XXX.

SUIT-MONEY FOR THE WIFE AND THE HUSBAND'S OTHER LIKE  
LIABILITIES.

§ 966. Introduction.

967-975. Husband's Liability as for Necessaries.

976-991. Suit-money ordered during Litigation.

992. Doctrine of Chapter restated.

§ 966. **How Chapter divided.** — We shall consider, I. The Husband's Common-law Liability for Legal Help to the Wife considered as Necessaries; II. Suit-money ordered to the Wife during a Divorce Litigation.

*I. The Husband's Common-law Liability for Legal Help to the  
Wife considered as Necessaries.*

§ 967. **Necessaries distinguished from Alimony.** — Quite apart from the duty of a delinquent husband to aliment his wife on a divorce decree, and the duty of any husband to supply her with suit-money during a divorce litigation, is his common-law liability to a third person who furnishes her with necessaries, explained in the first volume.<sup>1</sup> Among the necessaries is her —

§ 968. **Protection in Society.** — It would be vain for a husband to furnish his wife with food, clothing, and shelter if he left her without protection from assaults and other physical abuse. Therefore protection in society is reckoned among the necessaries.<sup>2</sup> And it makes no difference whether the individual against whom the protection is required is a third person or the husband himself. Thus, —

§ 969. **Articles of Peace.** — By all opinions, a wife compelled to exhibit articles of peace against her husband may employ the needful legal assistance, and the person rendering it can collect

<sup>1</sup> Vol. I. § 1183-1312.

<sup>2</sup> Vol. I. § 1189.



the pay of him.<sup>1</sup> To quote from Lord Ellenborough, "she carried along with her a credit for whatever her preservation and safety required. She had a right to appeal to the law for protection, and she must have the means of appealing effectually. She might, therefore, charge her husband with the necessary expense of the proceeding, as much as for necessary food or raiment."<sup>2</sup> On the other hand, if the husband exhibits articles against her, she may charge him with the legal services needful for her defence.<sup>3</sup> Within the same principle, —

§ 970. **Husband's Breach of Peace.** — When a wife swore out a complaint against her husband for a breach of the peace toward her, and in default of bail he was thereon imprisoned, the attorney employed by her was held entitled to collect from him the proper charges as for necessities supplied for her protection.<sup>4</sup> "If, however, there were no reasonable grounds for instituting the proceedings, the law is otherwise."<sup>5</sup> But —

§ 971. **An Indictment** — against the husband for an assault on the wife has been deemed a step not necessary for her protection. Therefore she cannot charge him with the expense.<sup>6</sup> Now, —

§ 972. **Divorce Suit.** — Is a divorce suit to be reckoned among the necessities of a wife? Is her defence against the husband's suit a necessary for her? Upon these questions the authorities are in discord. We have a pretty clear —

§ 973. **English Doctrine.** — A legal person in England who, in good faith and on probable cause, carries on or defends a wife's divorce suit with her husband, can recover at law of him compensation for the services and expenses, to the extent to which he does not obtain it by order of the court in the suit itself. Probable cause is essential, but it is not required that his well-directed exertions should be successful.<sup>7</sup> Nor, the wife being petitioner, is it necessary that the case should be carried to the end, or that

<sup>1</sup> *Shepherd v. Mackoul*, 3 Camp. 326; *Williams v. Fowler, McClel. & Y.* 269; *Turner v. Rookes*, 10 A. & E. 47, 2 Per. & D. 294; 2 *Bright Hus. & Wife*, 8.

<sup>2</sup> *Shepherd v. Mackoul*, *supra*.

<sup>3</sup> *Warner v. Heiden*, 28 Wis. 517, 9 Am. R. 515; approved in *Barker v. Hibbard*, 54 N. H. 539, 541, 20 Am. R. 160.

<sup>4</sup> *Morris v. Palmer*, 39 N. H. 123.

<sup>5</sup> *Hibbard, J. in Barker v. Hibbard*, 54 N. H. 539, 541, 20 Am. R. 160, referring to *Smith v. Davis*, 45 N. H. 566, 570.

<sup>6</sup> *Grindell v. Godmand*, 13 Leg. Obs. 467, 1 Nev. & P. 168, 2 Har. & W. 339; s. c. nom. *Grindell v. Godmond*, 5 A. & E. 755; *Conant v. Burnham*, 133 Mass. 503, 43 Am. R. 532.

<sup>7</sup> *Brown v. Ackroyd*, 5 Ellis & B. 819, 827, 829, 34 Eng. L. & Eq. 214, 217; *Rice v. Shepherd*, 12 C. B. n. s. 332, 333. Compare with *Williams v. Monroe*, 18 B. Monr. 514. And see, as perhaps sustaining this view, *Williams v. Fowler, McClel. & Y.* 269.

application for suit-money, termed in England costs, should be made to the Divorce Court. Said Erle, C. J.: "The right to apply for a taxation *de die in diem* is a concurrent or cumulative remedy, and may well coexist with the common-law right to bring an action."<sup>1</sup> These doctrines were established as to the divorce from bed and board, afterward they were applied to the suit for dissolution. Moreover, when the Divorce Court taxes the costs as between party and party, the wife's solicitor may take what he can get thereon, then recover of the husband what further is chargeable as between client and solicitor. For example, when that court rejected from a solicitor's bill what the report describes as "costs of taking counsel's opinion and correspondence with the defendant's wife; secondly, charges arising out of proposals for a compromise of the suit in the Divorce Division made by the defendant; thirdly, payments made to a detective for procuring evidence; fourthly, payments in respect of other matters, alleged to be properly chargeable as between solicitor and client," — the solicitor was held to be entitled, supposing the bill to be right as for what it professed, to recover these items of the husband.<sup>2</sup>

§ 974. **With us**, — the authorities are in every form of conflict, resulting in nothing which may be deemed an American doctrine. The principle governing the question, on all sides concurred in, appears above. Beyond which, since every practitioner must look into the reports of his own State, and he will have them before him, it is believed that nothing can be added more helpful than simply to cite the leading American authorities.<sup>3</sup>

<sup>1</sup> Rice v. Shepherd, *supra*.

<sup>2</sup> Ottaway v. Hamilton, 3 C. P. D. 393. Some of the more important cases cited to sustain this doctrine are, besides those before referred to in this section, In re Hooper, 33 Law J. N. S. Ch. 300; Stocken v. Patrick, 29 Law T. N. S. 507.

<sup>3</sup> Alabama. — Harris v. Davis, 1 Ala. 259.

California. — Reynolds v. Reynolds, 67 Cal. 176.

Connecticut. — Shelton v. Pendleton, 18 Conn. 417; Cooke v. Newell, 40 Conn. 596, 598.

Georgia. — Sprayberry v. Merk, 30 Ga. 81, 82, 76 Am. D. 637; Glenn v. Hill, 50 Ga. 94.

Illinois. — Dow v. Eyster, 79 Ill. 254.

Indiana. — McCullough v. Robinson, 2 Ind. 630.

Iowa. — Johnson v. Williams, 3 Greene, Iowa, 97, 54 Am. D. 491; Porter v. Briggs, 38 Iowa, 166, 18 Am. R. 27; Preston v. Johnson, 65 Iowa, 285; Clyde v. Peavy, 74 Iowa, 47; Eaton v. Peavy, 75 Iowa, 740; Sherwin v. Maben, 78 Iowa, 467.

Kansas. — Gossett v. Patten, 23 Kan. 340.

Kentucky. — Williams v. Monroe, 18 B. Monr. 514.

Maryland. — McCurley v. Stockbridge, 62 Md. 422, 50 Am. R. 229.

Massachusetts. — Coffin v. Dunham, 8 Cush. 404, 54 Am. D. 769.

New Hampshire. — Morrison v. Holt,

§ 975. **Whether Wife liable.** — Notwithstanding the disabilities of coverture, explanations in a preceding chapter disclose some ground of principle for holding that even under the common-law rules, much more under modern statutes, the wife may bind herself to pay for services rendered her in her divorce suit, whether she is plaintiff or defendant.<sup>1</sup> But the contrary, under the common-law rules, has been held in the few cases we have on the subject. Not even can her promise be enforced after the coverture is dissolved.<sup>2</sup> And if, after the dissolution, she renews her promise, it is void also for want of consideration.<sup>3</sup>

## II. *Suit-money ordered to the Wife during a Divorce Litigation.*

§ 976. **General.** — Natural justice and the policy of the law alike demand that in any litigation between husband and wife, they shall have equal facilities for presenting their case before the tribunal. This requires that they shall have equal command of funds.<sup>4</sup> So that if she is without means, the law having vested the acquisitions of the two in him, he should be compelled to furnish them to her, to an extent rendering her his equal in the suit. This doctrine is a part of the same whereon proceeds temporary alimony. And so the English courts have from the earliest times to the present held without the aid of any act of Parliament, and nearly all of our own have accepted the doctrine as of common law.<sup>5</sup> A few of our States early presented

42 N. H. 478, 480, 80 Am. D. 120; Ray v. Adden, 50 N. H. 82, 9 Am. R. 175.

*New Jersey.* — Gregory v. Gregory, 5 Stew. Ch. 424.

*Ohio* — Dorsey v. Goodenow, Wright, 120.

*Pennsylvania.* — Graves v. Cole, 19 Pa. 171.

*Vermont.* — Wing v. Hurlburt, 15 Vt. 607, 40 Am. D. 695.

*West Virginia.* — Peck v. Marling, 22 W. Va. 708.

*Wisconsin.* — Clarke v. Burke, 65 Wis. 359, 56 Am. R. 631.

<sup>1</sup> Ante, § 693-696. And see Peck v. Marling, 22 W. Va. 708.

<sup>2</sup> Wilson v. Burr, 25 Wend. 386; Viser v. Bertrand, 14 Ark. 267; Cook v. Walton, 38 Ind. 228; Musick v. Dodson, 76 Mo. 624, 43 Am. R. 780; McCabe v. Britton, 79 Ind. 224.

<sup>3</sup> Putnam v. Tennyson, 50 Ind. 456; Musick v. Dodson, supra. And see Bishop Con. § 44.

<sup>4</sup> Ante, § 694-696.

<sup>5</sup> Ante, § 920, 921; D'Aguilar v. D'Aguilar, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 338; Belcher v. Belcher, 1 Curt. Ec. 444, 6 Eng. Ec. 372; Story v. Story, Walk. Mich. 421; Holmes v. Holmes, 2 Lee, 90, 6 Eng. Ec. 49; Fitzgerald v. Fitzgerald, 1 Lee, 649, 5 Eng. Ec. 472; Bird v. Bird, 1 Lee, 572, 5 Eng. Ec. 455; Daiger v. Daiger, 2 Md. Ch. 335; Coles v. Coles, 2 Md. Ch. 341; Tayman v. Tayman, 2 Md. Ch. 393; Waldron v. Waldron, 55 Pa. 231; Thompson v. Thompson, 3 Head, 527; Lake v. Lake, 16 Nev. 363, 17 Nev. 230; Wuest v. Wuest, 17 Nev. 217; S. v. St. Louis Court of Appeals, 88 Mo. 135; Westerfield v. Westerfield, 9 Stew. Ch. 195; Powers Appeal, 120 Pa. 320; Wagner v.

qualified or absolute exceptions.<sup>1</sup> But they have been generally removed by statutes. Even —

§ 977. **In Suits not for Divorce** — this doctrine has been sometimes acted upon. For example, on a wife's bill to enforce against her husband his agreement to make a marriage settlement, he was ordered to pay money to her for the expenses of the litigation.<sup>2</sup>

§ 978. **Not in Need — (Separate Income).** — Precisely as in temporary alimony,<sup>3</sup> this suit-money is given only to a wife in need, so that if she has an adequate separate income it is withheld.<sup>4</sup> Or if she has sufficient in part, the husband must supply the residue.<sup>5</sup>

§ 979. **Practical Equity** — is that at which this proceeding aims. And it will be so adjusted as to accomplish this end.<sup>6</sup> Moreover, —

§ 980. **Costs to the Wife** — as the prevailing party<sup>7</sup> may be given where there has been no suit-money.<sup>8</sup> And thus and in other ways what was lacking in justice during the progress of the suit may be made up at its close.<sup>9</sup>

§ 981. **Husband Destitute.** — A defending husband, whose only means are in the hands of the wife, cannot be compelled to pay

Wagner, 36 Minn. 239; Larkin v. Larkin, 71 Cal. 330; Collins v. Collins, 80 N. Y. 1; McCurley v. McCurley, 60 Md. 185, 45 Am. R. 717; Black v. Black, 5 Mont. 15; Dawson v. Dawson, 37 Mo. Ap. 207.

<sup>1</sup> Ante, § 916-919; Shelton v. Pendleton, 18 Conn. 417, 421; S. v. Judge Seventh District Court, 22 La. An. 264.

<sup>2</sup> Wilson v. Wilson, 1 Des. 219.

<sup>3</sup> Ante, § 930.

<sup>4</sup> Furst v. Furst, Poynter Mar. & Div. 260, note; Davis v. Davis, Ib. 261, note; Fyler v. Fyler, Deane & S. 175; Kenemer v. Kenemer, 26 Ind. 330; Porter v. Porter, 41 Missis. 116; Eaton v. Eaton, Law Rep. 2 P. & M. 51; Coad v. Coad, 40 Wis. 392; Westerfield v. Westerfield, 9 Stew. Ch. 195; Maxwell v. Maxwell, 28 Hun, 566.

<sup>5</sup> D'Aguilar v. D'Aguilar, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 338; Belcher v. Belcher, 1 Curt. Ec. 444, 446, 6 Eng. Ec. 372, 373; Wilson v. Wilson, 2 Hag. Con. 203; Logan v. Logan, 2 B. Monr. 142; Collins v. Collins, 2 Paige, 9; Holmes v. Holmes, 2 Lee, 90, 6 Eng. Ec. 49; Turst v. Turst, 2 Lee, 92, note, 6 Eng. Ec. 50;

Rose v. Rose, 11 Paige, 166; Beavan v. Beavan, 2 Swab. & T. 652.

<sup>6</sup> Phillips v. Phillips, 27 Wis. 252; Kittle v. Kittle, 8 Daly, 72; Weaver v. Weaver, 33 Ga. 172; Clark v. Clark, 4 Swab. & T. 111; Nicholson v. Nicholson, 3 Swab. & T. 214; Powell v. Powell, Law Rep. 3 P. & M. 186.

<sup>7</sup> Ante, § 810-820.

<sup>8</sup> D'Aguilar v. D'Aguilar, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 338; Wilson v. Wilson, Poynter Mar. & Div. 263, note.

<sup>9</sup> Wilson v. Wilson, Law Rep. 2 P. & M. 435; Ling v. Ling, 1 Swab. & T. 187; Milne v. Milne, Law Rep. 2 P. & M. 202; Phelan v. Phelan, 12 Fla. 449; Kendall v. Kendall, 1 Barb. Ch. 610; Adams v. Adams, Law Rep. 1 P. & M. 333; Whitmore v. Whitmore, Law Rep. 1 P. & M. 96; Dent v. Dent, Law Rep. 1 P. & M. 125; Cooke v. Cooke, 3 Swab. & T. 374; Carstairs v. Carstairs, 3 Swab. & T. 538; Heal v. Heal, Law Rep. 1 P. & M. 300; Churchill v. Churchill, Law Rep. 1 P. & M. 485; Griffin v. Griffin, 47 N. Y. 134.

anything to her;<sup>1</sup> except perhaps in special circumstances, wherein it may become just to draw on his ability to earn money,<sup>2</sup> as explained in a preceding chapter.<sup>3</sup> But a plaintiff husband, destitute both of funds and ability, will in a proper case have his suit suspended until he can do justice to his defending wife.<sup>4</sup> If he cannot aliment her, and give her the means of defence, he cannot have his divorce.<sup>5</sup> Consistently with this rule, where the complainant was an infant without pecuniary resources, and the suit was prosecuted by his father as next friend, and the wife applied for an order on the father to supply funds for her defence out of his own estate, yet it appearing she was a common prostitute keeping a house of ill-fame, the court declined either to make the order or stay the proceedings until the husband should arrive at full age.<sup>6</sup>

§ 982. **Non-appearing Husband.** — Since, to justify this allowance, both parties must be before the court,<sup>7</sup> if a husband does not appear to the wife's suit, but suffers a default, she cannot have suit-money. Yet where the court has the needful discretion,<sup>8</sup> it will include a reasonable counsel fee in her taxed bill of costs.<sup>9</sup> On the other side, —

§ 983. **Non-appearing Wife.** — If to the husband's suit the wife does not appear, she cannot have suit-money, even though his complaint is dismissed for want of proof. For as against her its allegations must be accepted as true, and the further inquiry was merely to satisfy the conscience of the court and protect the public interests.<sup>10</sup>

§ 984. **Husband with Adequate Funds — The Rule.** — If the husband is poor, he may still be required to furnish something

<sup>1</sup> *Laurie v. Laurie*, 9 Paige, 234. And see *Kittle v. Kittle*, 8 Daly, 72; *Thayer v. Thayer*, 9 R. I. 377.

<sup>2</sup> *Kirby v. Kirby*, 1 Paige, 261, 262.

<sup>3</sup> Ante, § 892, 893.

<sup>4</sup> *Bruere v. Bruere*, 1 Curt. Ec. 566, 6 Eng. Ec. 391; *Walker v. Walker*, 1 Curt. Ec. 560. And see *Winter v. San Francisco Superior Court*, 70 Cal. 295; *Newhouse v. Newhouse*, 14 Or. 290.

<sup>5</sup> *Purcell v. Purcell*, 3 Edw. Ch. 194. For this reason, want of visible means is deemed in Missouri no ground for withholding the order for suit-money; *Mangels v. Mangels*, 6 Mo. Ap. 481.

<sup>6</sup> *Perkins v. Perkins*, cited in *Osgood v. Osgood*, 2 Paige, 621, 622. See *Thayer v. Thayer*, 9 R. I. 377; *Soules v. Soules*, 3 Grant Ch., U. C. 113. And see on the subject generally of this section, *Cason v. Cason*, 15 Ga. 405.

<sup>7</sup> Ante, § 943.

<sup>8</sup> Ante, § 813, 815.

<sup>9</sup> *Graves v. Graves*, 2 Paige, 62. And see *Letts v. Letts*, Law Rep. 2 P. & M. 16.

<sup>10</sup> *Perry v. Perry*, 2 Barb. Ch. 285. And see *Graves v. Graves*, 2 Paige, 62; ante, § 663, 664, 692, 704.

to his destitute wife. On the other hand, though his means are abundant, there is a limit which he cannot be compelled to exceed. In reason, such a husband should furnish to such a wife what will practically suffice to present her cause fully, intelligently, and effectively to the court, in respect both of the evidence and of the law.<sup>1</sup> Of course, in the application of this rule, results will greatly vary with the special circumstances. We have in the books such views as,—

§ 985. **As between Agent and Client.**—It was in a Scotch case admirably laid down that “the taxation of the accounts must be as between agent and client, with this material qualification, that the agent is to be held as acting without special instructions, and therefore liable for the propriety and reasonableness of his proceedings.”<sup>2</sup> And the same rule in substance was announced in Upper Canada.<sup>3</sup> This rule would not cover everything which a wife might have a fancy to spend, or spend through delight in making her husband pay for it, but everything deemed by the court reasonable. If, for example, the wife wantonly and without probable cause alleges what she cannot prove, this may be ground for disallowing her claim in part, though she succeeds in her suit; but the mere fact of her having failed to establish a particular averment is not sufficient.<sup>4</sup>

§ 986. **As between Party and Party.**—The substance of this Scotch rule is the rule also in England, where the allowance is said to be as between party and party,<sup>5</sup> with the qualification that the same thing is not meant as when the expression is applied to the taxation of costs in other causes. The present Divorce Court follows herein the ecclesiastical method, wherein the phrase “as between party and party” had, said Cresswell, J., “a very different construction from that put upon it in common-law courts, because there they only allow the costs of such issues as are found for the persons who are to receive costs. I think that the only limit which can with propriety be put upon the allowance of the

<sup>1</sup> And consult the reasoning in *Robertson v. Robertson*, 6 P. D. 119, 122, 123, affirmed 8 P. D. 94.

<sup>2</sup> *Taylor v. Binnie*, 4 Deas & Anderson, 314, 10 Scotch Sess. Cas. 18.

<sup>3</sup> *Soules v. Soules*, 3 Grant Ch., U. C. 113.

<sup>4</sup> *Soilleux v. Soilleux*, 1 Hag. Con. 373, 4 Eng. Ec. 434. And see *Dorsey v. Goode-nov*, Wright, 120; *Kirk v. Kirk*, 3 Scotch

Sess. Cas. 4th ser. 128; *Edward v. Edward*, 6 Scotch Sess. Cas. 4th ser. 1255; *Harding v. Harding*, 2 Swab. & T. 549; *Keane v. Keane*, Law Rep. 3 P. & M. 52; *Ditchfield v. Ditchfield*, Law Rep. 1 P. & M. 729; *Wilson v. Wilson*, Law Rep. 2 P. & M. 435; *Lishey v. Lishey*, 6 Lea, 418.

<sup>5</sup> Ante, § 973; *Ottaway v. Hamilton*, 3 C. P. D. 393.

costs of the different issues raised in this court is this: where the taxing officer is satisfied that an issue has been vexatiously and improperly put on the record, so as to occasion a wanton and unnecessary increase in the amount of costs, he is not to allow the costs of that issue." And this rule extends to the number of witnesses; compensation is to be made for all who are produced in good faith, not for others. Again, "In the common-law courts the expenses incurred by witnesses in obtaining information are not allowed. If a witness makes a journey to learn something, he is not allowed the expenses of his journey." But in a divorce cause, this sort of expense, incurred by the wife, must be paid by the husband; that is, it is included in what in England are termed her taxed costs.<sup>1</sup>

§ 987. **The Number of Counsel**—whom the wife may have at the expense of the husband will depend on the nature of the case and the usages of the particular court.<sup>2</sup>

§ 988. **Fees of Counsel**.—It has been laid down that no testimony is required to determine what is a reasonable counsel fee. The judge may consult his own experience and knowledge in connection with what he can discern of the particular case.<sup>3</sup> From the last section it becomes plain that the wife cannot employ as many lawyers as she pleases,<sup>4</sup> at whatever fees, and compel the husband as of course to pay all. The rule is to allow whatever under the circumstances is reasonable, not inquiring what the particular counsel employed by the wife should receive.<sup>5</sup> And where she had created needless expenses, the court refused to compel the husband to pay them, except in part.<sup>6</sup> Particularly also,—

§ 989. **The Special Facts**—of the individual case should be taken into the account. For example, in theory there is one law alike for the rich and the poor. Theoretically, therefore, a poor person ought to have as good a lawyer, and to expend as much in incidental things in his lawsuit, as a rich one. Yet in truth, the poor do not spend as much in their lawsuits as the

<sup>1</sup> *Allen v. Allen*, 2 Swab. & T. 107, 110, 111. And see *Sumner v. Sumner*, 54 Wis. 642.

<sup>2</sup> *Money v. Money*, 1 Spinks, 117; *Suggate v. Suggate*, 1 Swab. & T. 497, 498; *Uhlman v. Uhlman*, 51 N. Y. Super. 361.

<sup>3</sup> *Peyre v. Peyre*, 79 Cal. 336.

<sup>4</sup> *Dugan v. Dugan*, 1 Duv. 289.

<sup>5</sup> *Baldwin v. Baldwin*, 6 Gray, 341. As to the question under the earlier statute, see *Coffin v. Dunham*, 8 Cush. 404, 54 Am. D. 769.

<sup>6</sup> *Williams v. Williams*, 29 Wis. 517. And see *De Llamosas v. De Llamosas*, 62 N. Y. 618.

rich. Therefore a poor husband should not, in these cases, be required to provide as much money for his wife as a rich one. The principle is analogous to that whereon temporary alimony proceeds, yet not exactly the same. In a Georgia case, where the wife's chastity was in issue, and she was of previous good character, and the husband was worth twelve thousand dollars, it was deemed that five hundred dollars was not an excessive sum for him to be required to pay for her counsel fees. "As nothing," said Stephens, J., "can be dearer to a lady than her character for chastity, so nothing could justify greater expense in its defence."<sup>1</sup>

§ 990. **Some other Questions**, — particularly of practice, have been decided by the English courts, not of special relevancy with us. As to them, a simple reference to cases must suffice.<sup>2</sup>

§ 991. **With us**, — the practice whereby the English courts compel the husband to furnish suit-money to the wife is not followed even in a single State, though the substance of the English law prevails in all. So likewise the practice differs among the States. The amount of the allowance varies, not only with the husband's faculties and the wife's needs, but with the special circumstances of cases no two of which are alike, and with the differing fees for counsel customary in different localities, and with various minor things. So that a simple reference to the American cases on questions not covered by the foregoing expositions will furnish to the practitioner all the further help possible without a too great enlargement of the chapter.<sup>3</sup>

### § 992. *The Doctrine of this Chapter restated.*

It would be a disgrace to the law and a grievous offence against justice if, after a woman had given her person and property in marriage to a man with whom afterward a litigation arose as to

<sup>1</sup> Collins v. Collins, 29 Ga. 517, 519.

<sup>2</sup> Dickens v. Dickens, 2 Swab. & T. 103, 105; Wells v. Wells, 1 Swab. & T. 308, 312; Ellaytt v. Ellaytt, 3 Swab. & T. 503, 508; Keats v. Keats, 1 Swab. & T. 334, 358; Hall v. Hall, 3 Swab. & T. 390; Hepworth v. Hepworth, 2 Swab. & T. 414, 416; Sopwith v. Sopwith, 2 Swab. & T. 105; Glennie v. Glennie, 3 Swab. & T. 109; Cooke v. Cooke, 3 Swab. & T. 603; Flower v. Flower, Law Rep. 3 P. & M. 132; Llewelyn's Divorce Bill, 1 Macq. Scotch Ap.

Cas. 280; Weber v. Weber, 1 Swab. & T. 219, 221; Greg v. Greg, 2 Add. Ec. 276, 285; Simmons v. Simmons, 1 Rob. Ec. 566; Whittaker v. Whittaker, 7 P. D. 15; Smith v. Smith, 7 P. D. 84, 227; Lynch v. Lynch, 10 P. D. 183; Apthorpe v. Apthorpe, 12 P. D. 192; Field v. Field, 13 P. D. 23; Harrison v. Harrison, 13 P. D. 180; Bates v. Bates, 14 P. D. 17; Butler v. Butler, 14 P. D. 160, 15 P. D. 32, 126, 161.

<sup>3</sup> Alabama. — Ex parte King, 27 Ala. 387; Pearson v. Darrington, 32 Ala. 227;



the conduct of either in the new relation, or as to the validity of the marriage itself, she must sustain her prosecution or defence without the money essential thereto, and with no possible access to the fund which she had contributed to accumulate. Hence the doctrine and practice of suit-money. Without suit-money or, as a collateral remedy, with it, she can under the common-law rules, modified or denied in some of our States, employ counsel and other needful help, rendering the husband liable to pay for it. But this sort of justice is difficult of command, and in every way awkward and inadequate. The methods of assigning suit-money, and the general practice relating thereto, so differ in our States as specially to require the practitioner to look into the statutes, decisions, and judicial usages of his own State.

*Ex parte Smith*, 34 Ala. 455; *Jeter v. Jeter*, 36 Ala. 391; *Edwards v. Edwards*, 84 Ala. 361.

*California*. — *Ex parte Perkins*, 18 Cal. 60; *Schammel v. Schammel*, 74 Cal. 36; *Robinson v. Robinson*, 79 Cal. 511.

*Georgia*. — *Pinckard v. Pinckard*, 23 Ga. 286.

*Illinois*. — *Andrews v. Andrews*, 69 Ill. 609; *Blake v. Blake*, 70 Ill. 618; *Becker v. Becker*, 79 Ill. 532; *Blake v. P.* 80 Ill. 11; *Blake v. Blake*, 80 Ill. 523; *Raymond v. Raymond*, 13 Bradw. 189.

*Indiana*. — *Hart v. Hart*, 11 Ind. 384; *Harrell v. Harrell*, 39 Ind. 185; *McCabe v. Britton*, 79 Ind. 224.

*Iowa*. — *Small v. Small*, 42 Iowa, 111; *Champlin v. Champlin*, 42 Iowa, 169; *Barnes v. Barnes*, 59 Iowa, 456.

*Kentucky*. — *Burgess v. Burgess*, 1 Duv. 287; *Dugan v. Dugan*, 1 Duv. 289; *Thompson v. Warren*, 8 B. Monr. 488; *Meyar v. Meyar*, 3 Met. Ky. 298, 303.

*Louisiana*. — *Tucker v. Carlin*, 14 La. An. 734.

*Maine*. — *Farwell v. Farwell*, 31 Me. 591; *Dwelly v. Dwelly*, 46 Me. 377; *Prescott v. Prescott*, 65 Me. 478; *Russell v. Russell*, 69 Me. 336.

*Maryland*. — *Bell v. Jones*, 10 Md. 322.

*Michigan*. — *Goldsmith v. Goldsmith*, 6 Mich. 285; *Steller v. Steller*, 25 Mich. 159.

*Missouri*. — *Waters v. Waters*, 49 Mo. 385.

*Nebraska*. — *Atkins v. Atkins*, 13 Neb.

271; *McConahey v. McConahey*, 21 Neb. 463; *Aspinwall v. Sabin*, 22 Neb. 73, 3 Am. St. 258.

*New Jersey*. — *McEwen v. McEwen*, 2 Stock. 286; *Vroom v. Marsh*, 2 Stew. Ch. 15.

*New York*. — *Denton v. Denton*, 1 Johns. Ch. 364; *North v. North*, 1 Barb. Ch. 241, 43 Am. D. 778; *Kendall v. Kendall*, 1 Barb. Ch. 610; *Hammond v. Hammond*, Clarke, 151; *Longfellow v. Longfellow*, Clarke, 344; *Monroy v. Monroy*, 1 Edw. Ch. 382; *Forrest v. Forrest*, 5 Bosw. 672; *Morrell v. Morrell*, 2 Barb. 480; *Lansing v. Lansing*, 4 Lans. 377, 41 How. Pr. 248; *Strobridge v. Strobridge*, 21 Hun, 288; *Chase v. Chase*, 29 Hun, 527, 65 How. Pr. 306; *Winton v. Winton*, 31 Hun, 290; *Smith v. Smith*, 35 Hun, 378; *Donnelly v. Donnelly*, 63 How. Pr. 481; *Pritchard v. Pritchard*, 4 Abb. N. Cas. 298; *Winton v. Winton*, 12 Abb. N. Cas. 159; *Schloemer v. Schloemer*, 49 N. Y. 82; *De Llamosas v. De Llamosas*, 62 N. Y. 618; *Beadleston v. Beadleston*, 103 N. Y. 402.

*Pennsylvania*. — *Waldron v. Waldron*, 55 Pa. 231; *Groves's Appeal*, 68 Pa. 143; *Kline v. Kline*, 1 Philad. 383.

*Tennessee*. — *Lishey v. Lishey*, 6 Lea, 418.

*Wisconsin*. — *Helden v. Helden*, 9 Wis. 557, 11 Wis. 554; *Williams v. Williams*, 29 Wis. 517; *Varney v. Varney*, 52 Wis. 120, 38 Am. R. 726; *Pauly v. Pauly*, 69 Wis. 419; *Blake v. Blake*, 70 Wis. 238.

## CHAPTER XXXI.

## THE PERMANENT ALIMONY OF THE UNWRITTEN LAW.

- § 993, 994. Introduction.
- 995-1004. In General of this Alimony.
- 1005-1027. What Facts determine Amount.
- 1028-1036. The Amount.
- 1037. Doctrine of Chapter restated.

§ 993. **Elsewhere.** — Permanent and temporary alimony being in some respects diverse, in others identical, both being subjects for the judicial discretion, the absolute rules pertaining to either being few, and the whole subject being somewhat differently regulated by statutes in our respective States, an abstractly satisfactory division of it into chapters becomes impossible. Therefore the reader, searching for a particular thing, should first take a general view of the contents of this Book, then look at the place which the arrangement seems to indicate. In this chapter, —

§ 994. **How Chapter divided.** — We shall consider, I. In General of this Alimony; II. Upon what Facts the Amount is determined; III. The Amount.

I. *In General of this Alimony.*

§ 995. **In a Preceding Chapter,** — wherein are explained the nature and sorts of alimony,<sup>1</sup> most of what might be appropriate here is set down.

§ 996. **Discretionary.** — Permanent alimony, like temporary,<sup>2</sup> is, as to whether or not it shall be allowed, and as to the amount, not of strict and absolute right, but of the judicial discretion, to be exercised according to established principles of law, and upon an equitable view of all the circumstances of the particular case.<sup>3</sup>

<sup>1</sup> Ante, § 827-887.

<sup>2</sup> Ante, § 936, 947.

<sup>3</sup> Rees v. Rees, 3 Phillim. 387, 1 Eng. Ec. 418; Ricketts v. Ricketts, 4 Gill, 105;

§ 997. **The Permanent Alimony Sentence** — is not of precisely equal effect under every form of law and form of divorce. Everywhere it is a thing of value, and in general it is enforceable not only in the court of its rendition, but even in a foreign jurisdiction.<sup>1</sup> And it has been held, and it may be deemed established, that this alimony can be reached by the wife's creditors.<sup>2</sup> On the other hand, —

§ 998. **Arrears on Wife's Death.** — If while there are arrears unpaid the wife dies, the divorce having been a separation not dissolving the marriage, though still her creditors can enforce payment thereof from the husband to the extent of her debts, her representatives will have no claim upon them.<sup>3</sup> Even if her suit for their recovery was pending when she died, her administrator cannot take it up and carry it forward, except for the benefit of her creditors.<sup>4</sup> And —

§ 999. **Belong to Husband.** — Since the separation from bed and board does not terminate the marriage, the husband's right to succeed to the wife's property is not impaired. Therefore if the wife dies without creditors, the arrears of alimony are his.<sup>5</sup> But —

§ 1000. **Husband's Death — Alimony in Arrear.** — No rule of law extends beyond its support of reason. Therefore if the husband dies instead of the wife, his estate, it appears, is liable to pay the alimony due.<sup>6</sup> Of course, the proper steps must be taken;

*Burr v. Burr*, 7 Hill, N. Y. 207; *Richmond v. Richmond*, 1 Green Ch. 90; *Smith v. Smith*, 2 Phillim. 235, 1 Eng. Ec. 244; *Lawrence v. Lawrence*, 3 Paige, 267; *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178; *Otway v. Otway*, 2 Phillim. 109, 1 Eng. Ec. 203; *Hammond v. Hammond*, *Clarke*, 151; *McGee v. McGee*, 10 Ga. 477, 490; *Bergen v. Bergen*, 22 Ill. 187; *Pinckard v. Pinckard*, 22 Ga. 31, 68 Am. D. 481; *Breinig v. Breinig*, 26 Pa. 161; *Foote v. Foote*, 22 Ill. 425; *Farley v. Farley*, 30 Iowa, 353; *Thompson v. Thompson*, 10 Rich. Eq. 416; *Jolliff v. Jolliff*, 32 Ill. 527; *Powell v. Powell*, 53 Ind. 513; *Stillman v. Stillman*, 7 Baxter, 169; *Lake v. Bender*, 18 Nev. 361. But see, under the Pennsylvania statute, *Shoop's Appeal*, 34 Pa. 233; *Miles v. Miles*, 76 Pa. 357, 358.

<sup>1</sup> Ante, § 72, 850.

<sup>2</sup> *Stevenson v. Stevenson*, 34 Hun, 157; cases cited to the next section. Still there

are questions which will be differently decided under different conditions of law and fact, as to whether or not a particular act of the wife charged her alimony. And consult *Vandergucht v. De Blaquiére*, 8 Sim. 315; *Beard v. Webb*, 2 B. & P. 93; *Marshall v. Rutton*, 8 T. R. 545; *Murray v. Barlee*, 3 Myl. & K. 209, 220; cited in *Clark v. Clark*, 6 Watts & S. 85.

<sup>3</sup> *Stones v. Cooke*, cited 8 Sim. 321, note. See *Shaftoe v. Shaftoe*, 7 Ves. 171; *Dawson v. Dawson*, 7 Ves. 173. And see 2 Story Eq. Jurisp. § 1472.

<sup>4</sup> *Clark v. Clark*, 6 Watts & S. 85, referring to *Marshall v. Rutton*, 8 T. R. 545; *Hyde v. Price*, 3 Ves. 437; *Lean v. Schutz*, 2 W. Bl. 1195.

<sup>5</sup> *Clark v. Clark*, 6 Watts & S. 85, 87, 88, 89. And see *Sterling v. Sterling*, 12 Ga. 201.

<sup>6</sup> *Smith v. Smith*, 1 Root, 349; *Sloan v. Cox*, 4 Hayw. 75; *Francis v. Francis*,

it cannot be compelled against his representatives by motion.<sup>1</sup> Therefore also —

§ 1001. **Dissolution Alimony** — is not on the wife's death within the foregoing doctrines, not being within the reasons on which they rest. So, at least, it was held of a gross sum decreed her on a divorce from the bond of matrimony pursuant to a statute. She died leaving arrears unpaid, and her administrator was permitted to recover them of the husband. It was deemed that the divorce decree settled the pecuniary relations of the parties, and the sum given her became hers absolutely. Said Elliott, J.: "The allowance so authorized is named alimony in the statute, but it is not the alimony of the common law. . . . The reason for the rule at common law does not exist under the statute, and the rule itself should not, therefore, be applied."<sup>2</sup> Returning to the foregoing reasoning, —

§ 1002. **The Dismissal of the Suit**, — whether the divorce sought is from bed and board or from the marriage bond, leaves the woman a wife, and any temporary alimony awarded and unpaid fails.<sup>3</sup> The court could not and did not set it apart to her as separate property generally, but only for use in the separation made necessary by the suit, and it being ended her duty is to return to cohabitation.<sup>4</sup> If third persons have obtained a claim on the alimony, or if there are costs or fees owing to counsel, the case is in principle and probably in authority different.<sup>5</sup> The English Divorce Court, when before a hearing the petitioning wife has returned to cohabitation, will dismiss the suit at the husband's request only on payment of the taxed costs.<sup>6</sup>

§ 1003. **Money to the Wife in Compromise** — differs both from alimony due her on the dismissal of the cause and from arrears unpaid at her death.<sup>7</sup> When, therefore, her suit for alimony without divorce was settled by the husband's passing over to her coun-

31 Grat. 283; Lawton, Petitioner, 12 R. I. 210. See Jamison v. Jamison, 4 Md. Ch. 289, 298. **Husband's Bankruptcy.** — As to the effect of the husband's bankruptcy, &c., see Newhouse v. C. 5 Whart. 82; Texas's Case, 1 Ashm. 175; Dickens v. Dickens, 2 Swab. & T. 645.

<sup>1</sup> Guenther's Appeal, 40 Wis. 115.

<sup>2</sup> Miller v. Clark, 23 Ind. 370, 376.

<sup>3</sup> Ante, § 955; Chestnut v. Chestnut, 77 Ill. 346.

<sup>4</sup> Persons v. Persons, 7 Humph. 183;

s. r. Wright v. Wright, 6 Tex. 29. See Stafford v. Stafford, 9 Ind. 162.

<sup>5</sup> See, not exactly to the point in the text, yet as illustrating this general subject, Ex parte Bremner, Law Rep. 1 P. & M. 254; Patterson v. Patterson, Law Rep. 2 P. & M. 192; Thompson v. Thompson, 3 Head, 527; Thorndike v. Thorndike, 1 Wash. 175.

<sup>6</sup> Cooper v. Cooper, 3 Swab. & T. 392. And see Weaver v. Weaver, 33 Ga. 172.

<sup>7</sup> Ante, § 998, 999.

sel a sum for her, she was permitted to maintain her bill in equity against this counsel for it by next friend, not joining the husband.<sup>1</sup> Plainly, it was not now alimony, but her separate equitable property. And —

§ 1004. **Alimony paid.** — We may doubt whether, in any case where alimony, temporary or permanent, has actually passed to the wife, the husband can reclaim it. If he could, the decree would be substantially without legal effect. Therefore where, on a divorce from bed and board, the rents of some lands were given the wife toward her alimony, and out of them she made an annual saving, the husband on her death was adjudged not entitled to the fund thereby accumulated. This decision appears to have proceeded substantially on the principles of the unwritten law; but the court alluded to a statute which conferred on the wife obtaining a divorce “capacity to acquire and dispose of such property as she might procure by her own industry, or as might accrue by descent, devise, or in any *other manner*.”<sup>2</sup>

## II. *Upon what Facts the Amount is determined.*

§ 1005. **The Husband's Faculties** — are explained in a preceding chapter.<sup>3</sup> And it there appears that while they are the source whence alimony is derived, other considerations mingle with them in its allotment. To supplement here the elucidations there given, —

§ 1006. **Doctrine defined.** — In exercising the judicial discretion<sup>4</sup> which regulates the amount of the permanent alimony, the judge should take into contemplation the past conduct of the parties respectively, the source of the husband's property, what persons if any each is under a legal duty to support, the earning and acquiring capabilities of each, the wife's pecuniary means equally with the husband's, the health of each, and their respective ages; and especially, but not exclusively, he should consider what sum, chargeable upon the faculties of the erring husband, will leave the financial condition of the innocent wife not inferior to what it would be if his conduct had been correct. More minutely, —

§ 1007. **No Pecuniary Loss** — should fall on one from another's wrong. Therefore the wife's permanent alimony should be in a

<sup>1</sup> *Spencer v. Ford*, 1 Rob. Va. 648.

<sup>2</sup> *Darden v. Joyner*, 9 Ire. 339.

<sup>3</sup> Ante, § 888-906.

<sup>4</sup> Ante, § 996.

proportion to leave her, at least, as well off financially in non-cohabitation as she would be in cohabitation.<sup>1</sup> Beyond this, —

§ 1008. **Compensation for Injury.** — Every injury is, in law, entitled to its pecuniary compensation. So that in addition to the maintenance thus appearing, the wife should have something for her physical and mental sufferings, and the loss of the husband's society. The court should pass on this question as a jury would. We have not much direct adjudication to this proposition, but it is within well-established principles. Thus, —

§ 1009. **Husband's Delictum.** — The nature and extent of the husband's *delictum*, and the degree of clearness in the proof of it, are always taken into the account.<sup>2</sup> For example, the alimony will be made larger in proportion as his conduct has been the more, and more continuously, cruel, subjecting the wife to a life of greater hardship.<sup>3</sup> On the other side, we have a case which goes the extreme length of permitting the husband, on the alimony hearing after the judgment for divorce has passed, to introduce evidence tending to refute the charge of his dereliction in reduction of the alimony.<sup>4</sup> And there are other cases resting apparently on a like principle.<sup>5</sup> So —

§ 1010. **Wife's Demeanor.** — The demeanor and conduct of the wife toward the husband during the cohabitation will be taken into the account.<sup>6</sup> Thus, her alimony will be less if without justifying excuse she denied him conjugal access to her person.<sup>7</sup>

§ 1011. **Long Forbearance** — by the wife to bring her suit while tenderly waiting for a reformation, thus depriving herself of the support to which she was entitled, will enhance her alimony.

<sup>1</sup> *Barker v. Dayton*, 28 Wis. 367.

<sup>2</sup> Post, § 1011; *Mytton v. Mytton*, 3 Hag. Ec. 657, 5 Eng. Ec. 249; *Burr v. Burr*, 7 Hill, N. Y. 207; *Smith v. Smith*, 2 Phillim. 235, 1 Eng. Ec. 244; *Turrel v. Turrel*, 2 Johns. Ch. 391; *Rees v. Rees*, 3 Phillim. 387, 1 Eng. Ec. 418; *Williams v. Williams*, 4 Des. 183; *Durant v. Durant*, 1 Hag. Ec. 528, 3 Eng. Ec. 231; *Otway v. Otway*, 2 Phillim. 109, 1 Eng. Ec. 203; *Hammond v. Hammond*, Clarke, 151; *Lishey v. Lishey*, 2 Tenn. Ch. 1.

<sup>3</sup> *Mussing v. Mussing*, 104 Ill. 126; *Pauly v. Pauly*, 69 Wis. 419.

<sup>4</sup> *Sheafe v. Sheafe*, 4 Fost. N. H. 564.

As to which, see 1 Bishop Crim. Law, 5th ed. § 948.

<sup>5</sup> *Ensler v. Ensler*, 72 Iowa, 159; *Davis v. Davis*, 86 Ky. 32; *Pence v. Pence*, 6 B. Monr. 496.

<sup>6</sup> *Burr v. Burr*, 7 Hill, N. Y. 207; *Dejarnet v. Dejarnet*, 5 Dana, 499; *Peckford v. Peckford*, 1 Paige, 274; *Smith v. Smith*, 2 Phillim. 235, 1 Eng. Ec. 244; *Thornberry v. Thornberry*, 4 Litt. 251; *Hammond v. Hammond*, Clarke, 151; *Stewartson v. Stewartson*, 15 Ill. 145; *Severn v. Severn*, 7 Grant Ch., U. C. 109; *Jeter v. Jeter*, 36 Ala. 391.

<sup>7</sup> *Tumbleson v. Tumbleson*, 79 Ind. 558.

"If," it was in one case said by Nelson, C. J., "a few years of affluence can, to any extent, compensate her for the more than thirty years' unparalleled sufferings and misery which she has endured, either by the gratification of her feelings in the remuneration of those who have sheltered and nourished her in adversity, or in procuring her those indulgences and comforts which her age and health may require, it will not be an improper exercise of the discretion of the court—the ample means of the husband justifying it—to make the most liberal allowance."<sup>1</sup>

§ 1012. **The Wife's Income**—is, as explained in other connections,<sup>2</sup> always an element in the alimony computation.<sup>3</sup> The method is to add it to her husband's, consider what under all the circumstances should be allowed her out of the aggregate, then from the sum so determined deduct her separate income; and the remainder will be the allowance to be given her.<sup>4</sup> Also—

§ 1013. **Any other Means of Support**—possessed by the wife will be carried into the account;<sup>5</sup> as, that in leaving her husband she took with her what is adequate.<sup>6</sup> And—

§ 1014. **No Alimony**—will in various circumstances be given.<sup>7</sup> An illustration whereof is an application for temporary alimony by a wife who is supported by her paramour, with whom she is living.<sup>8</sup> And a wife who returns to her husband, by whom she is maintained, can no longer have alimony.<sup>9</sup> Even—

§ 1015. **Husband's Claim**.—Where the husband obtains a divorce from his wife for her fault, and the ownership of the property is mainly or entirely in her, it will in special circumstances be impossible to do justice between the parties without vesting some of this property in him. And perhaps there are States in which something like this authority is by statutes given to the courts.<sup>10</sup> But this is not so generally.<sup>11</sup> Nor, where the common-law rules

<sup>1</sup> *Burr v. Burr*, 7 Hill, N. Y. 207, 212.

<sup>2</sup> *Ante*, § 831–833, 952, 978.

<sup>3</sup> *Powell v. Powell*, Law Rep. 3 P. & M. 55, 186.

<sup>4</sup> *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178; *Street v. Street*, 2 Add. Ec. 1, 2 Eng. Ec. 195; *Morse v. Morse*, 25 Ind. 156; *Cole v. Cole*, 27 Wis. 531.

<sup>5</sup> *Pinckard v. Pinckard*, 22 Ga. 31, 68 Am. D. 481.

<sup>6</sup> *Bremner v. Bremner*, 3 Swab. & T. 249.

<sup>7</sup> *Fletcher v. Fletcher*, 2 Swab. & T.

434; *Coombs v. Coombs*, Law Rep. 1 P. & M. 218; *Powell v. Powell*, Law Rep. 3 P. & M. 55, 186.

<sup>8</sup> *Holt v. Holt*, Law Rep. 1 P. & M. 610.

<sup>9</sup> *Tiffin v. Tiffin*, 2 Binn. 202.

<sup>10</sup> *Small v. Small*, 42 Iowa, 111. And see *March v. March*, Law Rep. 1 P. & M. 440; *Thompson v. Thompson*, 2 Swab. & T. 649, 651.

<sup>11</sup> And see *Hardy v. Kirtland*, 34 Ind. 365.

have fixed their respective property rights, are the cases numerous in which justice would require this sort of transfer.

§ 1016. **Wife's Labor.** — As explained in a preceding chapter,<sup>1</sup> the wife's earnings and capacity to acquire must be taken into the account.<sup>2</sup> So that where the husband's income from property is not sufficient for all who are dependent on him, and the parties have been accustomed to toil for support and accumulations, the wife should not have an allowance so large as to relieve her from all necessity of exertion.<sup>3</sup>

§ 1017. **Income from Personal Labor — Wife of Poor Man.** — Where the husband's income is from his personal labor, the result as commonly stated is that the alimony should be less than where it is from fixed property.<sup>4</sup> Yet more exactly, the extent to which the wife of a poor man can have aid from her divorced husband must depend, as it would if he were in affluence, much upon what would determine her condition were they living together in the proper discharge of marital duties.<sup>5</sup> "If," said Johnston, C. J., "the parties are laboring people, the wife needs less. If she is in bad health, however, the amount should be increased. If the labor of the husband is of a comparatively unprofitable character, or if he is sickly, allowance should be made for these circumstances. If, on the other hand, he is in good health, and skilful, and is actually realizing considerable profits, the partner of his fortunes should not be refused a reasonable participation in them. Every case must be governed by its circumstances."<sup>6</sup>

§ 1018. **The Sources of the Husband's Property** — are important. If it came largely from the wife, the modern statutes in a part of our States authorize the courts in some circumstances to restore it to her.<sup>7</sup> But where there is no restoration, a partial justice is wrought out by the court's giving the wife in alimony a larger proportion of the husband's income than if all had been originally his.<sup>8</sup> And where the property is the joint accumulation of the

<sup>1</sup> Ante, § 892, 893.

<sup>2</sup> *Barrett v. Barrett*, 14 Stew. Ch. 139.

<sup>3</sup> *Brown v. Brown*, 22 Mich. 242. And see *Walling v. Walling*, 1 C. E. Green, 389; *George v. George*, Law Rep. 1 P. & M. 554; *Ward v. Ward*, 1 Swab. & T. 484.

<sup>4</sup> Ante, § 893, 895; *Lawrence v. Lawrence*, 3 Paige, 267.

<sup>5</sup> *Bursler v. Bursler*, 5 Pick. 427; *Smith*

*v. Smith*, 2 Phillim. 235, 1 Eng. Ec. 244; *Brown v. Brown*, 2 Hag. Ec. 5, 4 Eng. Ec. 11.

<sup>6</sup> *Prince v. Prince*, 1 Rich. Eq. 282, 289.

<sup>7</sup> Post, c. 36.

<sup>8</sup> *Smith v. Smith*, 2 Phillim. 152, 235, 1 Eng. Ec. 220, 244; *Harris v. Harris*, 1 Hag. Ec. 351, 3 Eng. Ec. 153; *Street v. Street*, 2 Add. Ec. 1, 2 Eng. Ec. 195;



two after marriage, the results will vary, but the proportion for alimony will be greater than if the wife had contributed nothing.<sup>1</sup>

§ 1019. **Dependants to support.** — It is important to consider whether there are children or other relatives to be supported or educated, and on whom rests the burden.<sup>2</sup> Specially as to —

§ 1020. **Children.** — In a chapter further on,<sup>3</sup> we are to consider the custody and support of the children of the parties. If children are committed to the wife, the proper form of the decree specifies that she is to have so much for alimony and so much for providing for them.<sup>4</sup> Yet by a loose practice, the two are not unfrequently blended, either under the double name for one sum, or under the single name of alimony.<sup>5</sup> Any burden of maintenance and education of children, resting on the husband, whether he discharges it in his own house or by payments to the wife, lightens her claim on him for alimony proper.<sup>6</sup> If the wife has a decree for alimony

*Fishli v. Fishli*, 2 Litt. 337; *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178; *Kempe v. Kempe*, 1 Hag. Ec. 532, 3 Eng. Ec. 233; *Payne v. Payne*, 4 Humph. 500, 40 Am. D. 660; *Chunn v. Chunn*, Meigs, 131; *Wright v. Wright*, 1 Edw. Ch. 62; *Foulkes v. Foulkes*, Poynter Mar. & Div. 256, note; *Devaismes v. Devaismes*, 3 Code R. 124, 3 Am. Law Jour. n. s. 279; *Stillman v. Stillman*, 7 Baxter, 169; *Cole v. Cole*, 27 Wis. 531.

<sup>1</sup> *Lovett v. Lovett*, 11 Ala. 763; *Jeans v. Jeans*, 2 Harring. Del. 142; *Conner v. Conner*, 29 Ind. 48; *Ressor v. Ressor*, 82 Ill. 442; *Dawson v. Dawson*, 110 Ill. 279; *Robbins v. Robbins*, 101 Ill. 416; *Sesterhen v. Sesterhen*, 60 Iowa, 301; *Cummings v. Cummings*, 50 Mich. 305.

<sup>2</sup> *Lawrence v. Lawrence*, 3 Paige, 267; *Germond v. Germond*, 4 Paige, 643; *Blaquiere v. Blaquiere*, 3 Phillim. 258; *Hawkes v. Hawkes*, 1 Hag. Ec. 526, 3 Eng. Ec. 230; *De Blaquiere v. De Blaquiere*, 3 Hag. Ec. 322, 5 Eng. Ec. 126, 129; *Amos v. Amos*, 3 Green Ch. 171; *Kirby v. Kirby*, 1 Paige, 261; *Fishli v. Fishli*, 2 Litt. 337; *Harris v. Harris*, 1 Hag. Ec. 351, 3 Eng. Ec. 153; *Smith v. Smith*, 2 Phillim. 152, 1 Eng. Ec. 220; *Kempe v. Kempe*, 1 Hag. Ec. 532, 3 Eng. Ec. 233; *Butler v. Butler*, Milward, 629; *Rees v. Rees*, 3 Phillim. 387, 1 Eng. Ec. 418; *Irwin v. Dowling*, Milward, 629;

*Miller v. Miller*, 6 Johns. Ch. 91; *Barrere v. Barrere*, 4 Johns. Ch. 187; *Bedell v. Bedell*, 1 Johns. Ch. 604; *Williams v. Williams*, 4 Des. 183; *Durant v. Durant*, 1 Hag. Ec. 528, 3 Eng. Ec. 231; *Whispell v. Whispell*, 4 Barb. 217; *Otway v. Otway*, 2 Phillim. 109, 1 Eng. Ec. 203; *Bird v. Bird*, 1 Lee, 418, 5 Eng. Ec. 396; *Lovett v. Lovett*, 11 Ala. 763; *Hammond v. Hammond*, Clarke, 151; *McGee v. McGee*, 10 Ga. 477, 490; *Becker v. Becker*, 79 Ill. 532; *Gardner v. Gardner*, 54 Ga. 560; *Hedrick v. Hedrick*, 28 Ind. 291; *Turner v. Turner*, 44 Ala. 437; *Conner v. Conner*, 29 Ind. 48.

<sup>3</sup> Post, c. 37.

<sup>4</sup> *Foote v. Foote*, 22 Ill. 425, 429; *Williams v. Williams*, 29 Wis. 517; *Ahrenfeldt v. Ahrenfeldt*, 4 Sandf. Ch. 493; *Call v. Call*, 65 Me. 407; *Husband v. Husband*, 67 Ind. 583, 33 Am. R. 107. And see *Thomas v. Thomas*, 41 Wis. 229; *Kerr v. Kerr*, 59 How. Pr. 255; *Wilson v. Wilson*, 45 Cal. 399; *Welch's Appeal*, 43 Conn. 342; *Plaster v. Plaster*, 47 Ill. 290; *Miller v. Miller*, 64 Me. 484; *Boggs v. Boggs*, 49 Iowa, 190; *Plaster v. Plaster*, 67 Ill. 93.

<sup>5</sup> *Draper v. Draper*, 68 Ill. 17; *Becker v. Becker*, 79 Ill. 532; *Cravens v. Cravens*, 4 Bush, 435.

<sup>6</sup> *Sesterhen v. Sesterhen*, 60 Iowa, 301; *Graft v. Graft*, 76 Ind. 136. And see *Luthe v. Luthe*, 12 Colo. 421.

and the custody of children, then if afterward she needs more money to be expended in their support, her proper course is to ask the court for a special order that the husband pay, not an increased alimony, but money for this specific purpose.<sup>1</sup>

§ 1021. **The Husband's Needs** — in other respects — such as his condition in life, place of residence, health, and employment, as demanding a larger or smaller sum for his own support — must be taken into the account.<sup>2</sup> So likewise —

§ 1022. **The Wife's** — condition in life, circumstances, health, place of residence, and consequent necessary expenditures must be considered.<sup>3</sup> For example, it was even on a petition for temporary alimony laid down that if the wife's health requires her to travel, she may have a special allowance for the purpose. And in this case the court granted her four hundred dollars to enable her to go and spend four months in the West Indies or the Southern States, her regular *ad interim* alimony to be suspended meanwhile.<sup>4</sup> Also —

§ 1023. **The Ages** — of the parties should be considered,<sup>5</sup> and —

**All other Facts** — adapted to influence the judicial discretion.<sup>6</sup> And —

§ 1024. **Beyond Income.** — There are circumstances justifying an allowance beyond the income, and trenching on the principal.<sup>7</sup> Some considerations of a different sort, yet highly practical, are —

§ 1025. **Ability to enforce Decree.** — To quote from Dr. Lushington: "In decreeing alimony in 1813, I have some recollection that Lord Stowell, upon being pressed to give a larger sum, observed that if he could think that the wife would be able to obtain it, he

<sup>1</sup> Hyde v. Hyde, 29 Law J. n. s. Mat. 150, 151, note; Whieldon v. Whieldon, 2 Swab. & T. 388; Foote v. Foote, 22 Ill. 425; Semrow v. Semrow, 23 Minn. 214. And see post, § 1212, 1213.

<sup>2</sup> Hawkes v. Hawkes, 1 Hag. Ec. 526, 3 Eng. Ec. 230; Kempe v. Kempe, 1 Hag. Ec. 532, 3 Eng. Ec. 233; Louis v. Louis, Law Rep. 1 P. & M. 230; Schlosser v. Schlosser, 29 Ind. 488; Webster v. Webster, 64 Wis. 438.

<sup>3</sup> Finlay v. Finlay, Milward, 575; Butler v. Butler, Milward, 629; Bursler v. Bursler, 5 Pick. 427; Prince v. Prince, 1 Rich. Eq. 282; Germond v. Germond, 4 Paige, 643.

\* Lynde v. Lynde, 4 Sandf. Ch. 373, 2 Barb. Ch. 72.

<sup>5</sup> Ante, § 1006; Miller v. Miller, 6 Johns. Ch. 91; Burr v. Burr, 7 Hill, N. Y. 207; Ricketts v. Ricketts, 4 Gill, 105; Lovett v. Lovett, 11 Ala. 763; Ressor v. Ressor, 82 Ill. 442.

<sup>6</sup> And see Russell v. Russell, 4 Greene, Iowa, 26, 61 Am. D. 112; Cummings v. Cummings, 50 Mich. 305; Mildeberger v. Mildeberger, 12 Daly, 195; Stock v. Stock, 11 Philad. 324.

<sup>7</sup> Ante, § 894, 895; Bursler v. Bursler, 5 Pick. 427; Germond v. Germond, 4 Paige, 643. And see Lynde v. Lynde, 2 Barb. Ch. 72.

would make a more ample allowance, but that the allotment of £200 a year he considered would be more beneficial to her. And the difficulties she is stated to have experienced in respect to her alimony seem to bear testimony to the propriety of that decree.”<sup>1</sup> But where there is no impediment of this nature,—

§ 1026. **The Husband's Temptation.**—having wronged his wife, to inflict on her the further wrong of defrauding her out of what the court decrees, should be present to the judicial mind while determining the sum for her alimony. The effect may not be a definite enhancement, but this consideration should prompt the tribunal to give her, while its mandate will be effectual, the full allowance indicated by the other facts of the case. At the same time, —

§ 1027. **Consideration for Husband.**—Both from humanity to the husband and in the interest of the wife, the decree should if practicable be in a form not to cripple him by compelling a sacrifice of his property. His ability to pay and hers to collect should be alike taken into the account and duly adjusted.<sup>2</sup>

### III. *The Amount.*

§ 1028. **Law combining with Facts.**—In determining the amount of alimony, the judge should take into consideration the analogous rules of the law in connection with such facts as are pointed out in the last sub-title. For the law is a harmonious system of reason, attuned to which is the judicial discretion. Thus,—

§ 1029. **Dower and Distribution.**—The dissolution of a marriage by divorce is analogous to its dissolution by death. A judicial separation from bed and board is partly so. In a sort of general way, with variations after which it is not needful here to inquire, the common law gives the widow on the death of the husband one third of his estate. So that, looking at this sort of analogy, if one third of the husband's income will leave the wife on divorce as well off pecuniarily as though the cohabitation continued,<sup>3</sup> with something in compensation for her injury,<sup>4</sup> such, when not reduced

<sup>1</sup> Neil v. Neil, 4 Hag. Ec. 273, 274.

<sup>2</sup> Farley v. Farley, 30 Iowa, 353; Forrest v. Forrest, 8 Bosw. 640; Abey v. Abey, 32 Iowa, 575; Ward v. Ward, 1 Swab. & T. 484; Williams v. Williams,

36 Wis. 362; Von Glahn v. Von Glahn, 46 Ill. 134; Raymond v. Raymond, 12 Bradw. 172.

<sup>3</sup> Ante, § 1007.

<sup>4</sup> Ante, § 1008.

by a separate income of her own,<sup>1</sup> may well be regarded as a sort of common, matter-of-course proportion. And —

§ 1030. **Matter-of-course Proportion — (One Third).** — It has been said that in England “one third of the husband’s income is the usual rate at which permanent alimony will be allotted.”<sup>2</sup> And this appears to be indicated by various English cases.<sup>3</sup> We have American ones perhaps a little like these,<sup>4</sup> but on the whole<sup>5</sup> there is not hitherto any sufficient ground for saying that we have any matter-of-course rule of any sort. In both countries alike, the proportion may be greater than one third, or it may be less. Thus —

§ 1031. **Particular Circumstances.** — In the language of an ecclesiastical report, “each case must depend upon its own particular circumstances; no two cases are exactly alike.”<sup>6</sup>

§ 1032. **More than in Temporary.** — Subject doubtless to special exceptions, since now the husband’s offence is established, and the wife’s rights may exceed her needs, her alimony should be greater than pending the suit.<sup>7</sup> And —

§ 1033. **One Half downward.** — In the ecclesiastical practice, the extreme allowance to the wife was one half the joint income, beyond which it was never suffered to go.<sup>8</sup> Yet this was not an uncommon proportion where the bulk of the property came from her, and the court had no power to restore any of it *in specie*.<sup>9</sup> And this is the rule, therefore, in the later Divorce Court, which is bound by the ecclesiastical practice, so that it will not allot more than one half of the joint income to the wife, though she may have brought more into the joint fund.<sup>10</sup> From the one half, the

<sup>1</sup> Ante, § 1012.

<sup>2</sup> Browning Div. Pract. 89.

<sup>3</sup> “The judge ordinary allotted alimony at the usual rate; namely, one third of the husband’s income, saying,” &c. Hyde v. Hyde, 29 Law J. N. S. Mat. 150, 151, note. “The judge ordinary refused to allot more than one third, as Mrs. Wallis had brought her husband no property; it appearing, from the reported causes, that the Ecclesiastical Court only allowed a moiety when a large proportion of the joint property had come originally from the wife.” Wallis v. Wallis, 29 Law J. N. S. Mat. 151, note.

<sup>4</sup> Stillman v. Stillman, 7 Baxter, 169; Musselman v. Musselman, 44 Ind. 106.

<sup>5</sup> Andrews v. Andrews, 69 Ill. 609.

<sup>6</sup> Smith v. Smith, 2 Phillim. 235, 1 Eng. Ec. 244.

<sup>7</sup> Smith v. Smith, 2 Phillim. 235, 1 Eng. Ec. 244; Otway v. Otway, 2 Phillim. 109, 1 Eng. Ec. 203; Andrews v. Andrews, 69 Ill. 609.

<sup>8</sup> So also with us. Wilson v. Wilson, 102 Ill. 297. And see Dawson v. Dawson, 110 Ill. 279.

<sup>9</sup> Smith v. Smith, 2 Phillim. 235, 1 Eng. Ec. 244; Cooke v. Cooke, 2 Phillim. 40, 1 Eng. Ec. 178; Otway v. Otway, 2 Phillim. 109, 1 Eng. Ec. 203; Taylor v. Taylor, cited in Cooke v. Cooke, supra; Stillman v. Stillman, 7 Baxter, 169.

<sup>10</sup> Haigh v. Haigh, Law Rep. 1 P. &

sum is graded downward through two fifths, "no unusual proportion,"<sup>1</sup> to one third;<sup>2</sup> between which ordinary limits it appears mostly to vibrate, though it sometimes descends to one fourth,<sup>3</sup> and even considerably lower.<sup>4</sup>

§ 1034. **Further of One Third.** — In a case where no part of the property came from the wife, Sir John Nicholl deemed one third a liberal allotment. He said: "The husband has neither state nor family to support, — he is living in retirement on his half-pay and private fortune. His income is £729, besides personal property worth about £700, making altogether an income of rather more than £750 per annum. Alimony at the rate of £250 per annum will not be too much, as Mrs. Kempe is, I apprehend, willing to take the child. If she declines to take it, the court may be induced somewhat to lessen this sum; but if the refusal proceeds from the husband, — if he will not allow his wife the comfort of retaining her infant, — the court, though it cannot control a father's rights, would not be disposed to hold such refusal as a ground for reducing the allowance."<sup>5</sup> Still, this learned judge said in another case: "The law has laid down no exact proportion; it sometimes gives a third, sometimes a moiety, according to circumstances."<sup>6</sup>

§ 1035. **Large and Small Incomes compared.** — Neither in reason nor in judicial practice is the rule, sometimes governing temporary alimony, that a less proportion will be given out of a large income than a small, applicable in permanent. Sir John Nicholl even suggested, while yet not deeming himself authorized to carry the suggestion practically to its full length, that when the property is large the considerations are reversed, and

M. 709. And see, as to this, *Hopkins v. Hopkins*, 39 Wis. 167; *Andrews v. Andrews*, supra; *Quisenberry v. Quisenberry*, 1 Duv. 197; *Ross v. Ross*, 78 Ill. 402; *Jeter v. Jeter*, 36 Ala. 391; *Hamilton v. Hamilton*, 37 Mich. 603; *Becker v. Becker*, 79 Ill. 532.

<sup>1</sup> *Street v. Street*, 2 Add. Ec. 1, 2 Eng. Ec. 195.

<sup>2</sup> *Ricketts v. Ricketts*, 4 Gill, 105; *Pomfret v. Pomfret*, cited in *Cooke v. Cooke*, supra; *Forrest v. Forrest*, 8 Bosw. 640; *Musselman v. Musselman*, 44 Ind. 106; *Turner v. Turner*, 44 Ala. 437.

<sup>3</sup> *Bush v. Bush*, 37 Ind. 164; *Draper*

*v. Draper*, 68 Ill. 17; *Hedrick v. Hedrick*, 28 Ind. 291.

<sup>4</sup> *Garner v. Garner*, 38 Ind. 139.

<sup>5</sup> *Kempe v. Kempe*, 1 Hag. Ec. 532, 3 Eng. Ec. 233.

<sup>6</sup> *Otway v. Otway*, 2 Phillim. 109, 1 Eng. Ec. 203. In Lord Pomfret's case, cited in this one, the income was £12,000 per annum, the alimony given was £4,000; the larger part of the fortune had come from the wife, and there was no family; but the husband was a peer, and had his rank and dignity to support. See also *Mytton v. Mytton*, 3 Hag. Ec. 657, 5 Eng. Ec. 249; *Westmeath v. Westmeath*, 3 Knapp, 42.

the proportion should be greater. "It is the delinquent then who should have the mere subsistence, and who ought to live in retirement."<sup>1</sup>

§ 1036. **Instances**—of judicial allotments under varying circumstances might easily be added and indefinitely multiplied. Their practical helpfulness, when stated briefly as they must be or not at all in a text-writer's exposition, may be doubted. A case, to be useful in this way, must be set out with absolute fulness. Therefore it is believed that the only further help practically possible will be to cite a collection of cases for readers to consult as they have occasion.<sup>2</sup> Not quite all relate to common-law alimony, that in some of them being statutory.

<sup>1</sup> *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178. I have thus stated the doctrine according to my understanding of this case. Shelford, citing it, says under the head of permanent alimony: "It seems that a larger proportion is given out of a small than a large income." Shelf. Mar. & Div. 593. In Wadd. Dig. p. 58, the case has this rendering: "It would appear that the court generally gives a larger proportion where the income is small, except where the husband acquires his subsistence by his own personal exertions." I can discover in the case no such doctrine; and,—Does it exist in reason? People ordinarily, and properly, live as well up to their income when it is large as when it is small. There is nothing in this imprudent or otherwise reprehensible. And when the husband dies, the wife's proportion is the same. It will not do to say that a certain sum is as much as a woman can reasonably spend; there is no limit even to reasonable expenditures; especially there is no judicial yardstick by which expenditures can be measured off.

<sup>2</sup> *English*.—*Biggs v. Biggs*, cited in *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178; *Dawson v. Dawson*, cited *ib.*; *Durant v. Durant*, 1 Hag. Ec. 528, 3 Eng. Ec. 231; *Whieldon v. Whieldon*, 2 Swab. & T. 388; *Harrison v. Harrison*, 12 P. D. 130; *Corbett v. Corbett*, 13 P. D. 136, 14 P. D. 7.

*Alabama*.—*Reese v. Reese*, 23 Ala. 785; *King v. King*, 28 Ala. 315.

*Colorado*.—*Luthe v. Luthe*, 12 Colo. 421.

*Georgia*.—*Swearingen v. Swearingen*, 19 Ga. 265.

*Illinois*.—*Stewartson v. Stewartson*, 15 Ill. 145; *Wheeler v. Wheeler*, 18 Ill. 39; *Von Glahn v. Von Glahn*, 46 Ill. 134; *Andrews v. Andrews*, 69 Ill. 609; *Robbins v. Robbins*, 101 Ill. 416; *Wilson v. Wilson*, 102 Ill. 297; *Mussing v. Mussing*, 104 Ill. 126; *Dawson v. Dawson*, 110 Ill. 279.

*Indiana*.—*Rudman v. Rudman*, 5 Ind. 63; *Hyatt v. Hyatt*, 33 Ind. 309; *Graft v. Graft*, 76 Ind. 136; *Metzler v. Metzler*, 99 Ind. 384.

*Iowa*.—*Inskeep v. Inskeep*, 5 Iowa, 204; *Sesterhen v. Sesterhen*, 60 Iowa, 301.

*Kentucky*.—*Thornberry v. Thornberry*, 4 Litt. 251; *Fishli v. Fishli*, 2 Litt. 337; *Beall v. Beall*, 80 Ky. 675.

*Maryland*.—*Ricketts v. Ricketts*, 4 Gill, 105.

*Massachusetts*.—*Orrok v. Orrok*, 1 Mass. 341.

*Michigan*.—*Hamilton v. Hamilton*, 37 Mich. 603.

*Mississippi*.—*Armstrong v. Armstrong*, 32 Missis. 279, 291.

*New Jersey*.—*Miller v. Miller*, Saxton, 386; *Richmond v. Richmond*, 1 Green Ch. 90; *Snover v. Snover*, 2 Stock. 261; *Barrett v. Barrett*, 14 Stew. Ch. 139.

*New York*.—*Burr v. Burr*, 7 Hill, N. Y. 207, 212, 10 Paige, 20, 38; *Miller v. Miller*, 6 Johns. Ch. 91; *Peckford v. Peckford*, 1 Paige, 274; *Lawrence v. Lawrence*, 3 Paige, 267; *Barrere v. Barrere*, 4 Johns. Ch. 187; *Bedell v. Bedell*,

§ 1037. *The Doctrine of this Chapter restated.*

When alimony comes to be permanently awarded, the right and wrong of the controversy have been settled. But this is only a step, while yet it is a necessary one, toward permanent alimony. The wife may be innocent and the husband guilty, whereupon a divorce may be pronounced in her favor, without entitling her to this provision; for example, where she is rich in her own right, largely through the contributions of the husband, and he has nothing. So that when the wife asks for alimony, the facts and equities must be inquired into; whereupon she may be given none, or may be given half the income of the husband, or given a smaller sum downward to nothing, according to the circumstances. These circumstances, viewed in a general way, and the law governing them have been explained in this chapter. Nothing further need be here repeated.

1 Johns. Ch. 604; *Forrest v. Forrest*, 25 N. Y. 501, 516; *Galusha v. Galusha*, 43 Hun, 181, 108 N. Y. 114.

*Ohio*. — *Clark v. Clark*, Wright, 225; *White v. White*, Wright, 138; *Amsden v. Amsden*, Wright, 66; *Roberts v. Roberts*,

Wright, 149; *Olney v. Watts*, 43 Ohio St. 499.

*South Carolina*. — *Prather v. Prather*, 4 Des. 33; *Taylor v. Taylor*, 4 Des. 167; *Williams v. Williams*, 4 Des. 183.

*Wisconsin*. — *Williams v. Williams*, 36 Wis. 362; *Pauly v. Pauly*, 69 Wis. 419.

## CHAPTER XXXII.

MARRIAGE DISSOLUTIONS AND SEPARATIONS FROM BED AND BOARD  
COMPARED AS TO PERMANENT ALIMONY.

§ 1038. **Already** — we have seen that by the unwritten law there is no permanent alimony on the dissolution of a marriage, while there may be temporary alimony in any form of the divorce suit.<sup>1</sup> So that —

§ 1039. **Statutory.** — All authority to decree alimony on a marriage dissolution comes from statutes. They are in terms not uniform, this particular provision is variously connected with other regulations of the property rights on divorce, and so the results differ somewhat in our respective States. Still, —

§ 1040. **Interpretations.** — All statutes, these alimony ones constituting no exceptions, are to be interpreted, not as isolated and independent directions or rules, but as additions to the prior written and unwritten laws, which to a due extent they modify and control, and by which in turn they are themselves modified and controlled; so that after their enactment, the same as before, the entire law, irrespective of its sources, remains and is one harmonious system of jurisprudence.<sup>2</sup> The consequence of which commonly is that this statutory alimony is not different from that of the unwritten law, it simply is allowed in a form of divorce wherein such law gave none. Added whereto, —

§ 1041. **"Alimony."** — Since it is a secondary rule of statutory interpretation, derivable from the primary one thus defined, that a legal term employed in a statute is as far as possible to be given its already established meaning,<sup>3</sup> the result just stated follows of necessity; namely, that the statutory alimony will be moulded by the judicial hands into shapes differing as little

<sup>1</sup> Ante, § 854-858, 954.

<sup>3</sup> *Ib.* § 96, 97, 99, 100, 204, 242-242 b.

<sup>2</sup> Bishop Written Laws, § 4, 5, 7, 10, 86.



from those of the unwritten law as the other statutory words allow.<sup>1</sup> Some illustrations of this sort of doctrine are —

§ 1042. **"Maintenance" — Alimony.** — Under a statute authorizing the court on divorce to "make such order in relation to the property of the parties and the maintenance of the wife as shall be right and proper," alimony was awarded, being the provision of the unwritten law for analogous circumstances, though the word "alimony" was not in it.<sup>2</sup> And, carrying the doctrine further, —

§ 1043. **Assimilating to Separate Estate.** — Under another statute in the same terms and with the same omission, the decree of the court, following the unwritten rule, was for alimony. But following likewise the statute, the court asserted the right so to change the form of the decree that the alimony should not, like that of the unwritten law,<sup>3</sup> cease on the husband's death, or unpaid arrears revert back to him on her death.<sup>4</sup> The decree might protect her against this by declaring the allowance to be separate estate, and authorizing her to dispose of such part of it as remains at her decease if the husband survives her, by an instrument in the nature of a will.<sup>5</sup>

§ 1044. **In Lieu of Dower.** — An Indiana statute authorized the divorcing court to restore property to the wife, and when it was not sufficient for her support to grant also a just and reasonable alimony, yet negating any implied authority to divest either party of any interest in real estate. And it was held that she could not be barred of dower by a decree for alimony in lieu thereof.<sup>6</sup> So —

§ 1045. **Court electing — Alimony preferred.** — A statute having permitted the court in its discretion to award a gross sum or an annual allowance for alimony, the court deemed that as a general rule the common-law annual should be preferred.<sup>7</sup> But the gross is better where the husband will be likely vexatiously to delay or withhold payment.<sup>8</sup>

<sup>1</sup> For illustration, *Blake v. Blake*, 68 Wis. 303; post, § 1053.

<sup>2</sup> *Dupont v. Dupont*, 10 Iowa, 112, 74 Am. D. 378; *Zuver v. Zuver*, 36 Iowa, 190. And see *Conner v. Conner*, 29 Ind. 48; post, § 1053.

<sup>3</sup> Ante, § 836.

<sup>4</sup> Ante, § 998.

<sup>5</sup> *Burr v. Burr*, 10 Paige, 20, in the Chancellor's and the Vice-Chancellor's

Courts; 7 Hill, N. Y. 207, 213, in the Court of Errors. And compare with ante, § 836.

<sup>6</sup> *Russell v. Russell*, Smith, Ind. 356, 1 Ind. 510. See *Madison v. Madison*, 1 Wash. 60.

<sup>7</sup> *Ross v. Ross*, 78 Ill. 402. And see *Blake v. Blake*, 68 Wis. 303.

<sup>8</sup> *McClung v. McClung*, 40 Mich. 493. And see *Prescott v. Prescott*, 59 Me. 146;

§ 1046. **Other Cases** — might be stated, confirmatory of the general doctrine set down in this chapter, but their simple citation will suffice.<sup>1</sup>

§ 1047. **The Next Chapter** — will afford further illustrations of the principles unfolded in this one.

§ 1048. *The Doctrine of this Chapter restated.*

Law being reason, not only in its disconnected particulars, but in its combined whole, so that the body of our jurisprudence is a system of reason, a statute which empowers the court to provide for the wife permanent alimony on the divorce from the marriage bond, when before it was allowable only on the separation from bed and board, does not create a new thing under the old name. It simply authorizes the old to be extended to the new subject. This is plain. But the greater part of our statutes are not thus simple in their terms. By various and dissimilar provisions, they largely authorize or command departures from the alimony rules of the unwritten law. And herein we have the similitudes and differences between bed and board and dissolution alimony.

Blankenship v. Blankenship, 19 Kan. 159. Cavana, 62 Barb. 109; Crain v. Cavana, 36 Barb. 410; Gaines v. Poor, 3 Met. Ky.

<sup>1</sup> Savage v. Crill, 19 Hun, 4; Crain v. 503; Stewart v. Stewart, 43 Ga. 294.

## CHAPTER XXXIII.

## STATUTORY ALIMONY ON THE DISSOLUTION OF THE MARRIAGE.

§ 1049. **The last Chapter** — is introductory to the present one, which is a sort of continuation of it.

§ 1050. **Statutes Diverse.** — The statutes of our several States on this subject are in greatly varying terms. Seldom have we the single provision that “alimony” may be given on a marriage dissolution.<sup>1</sup> While some of our statutes authorize it without employing the word,<sup>2</sup> others under this term establish what is quite different from the alimony of the unwritten law. Thus, —

§ 1051. **Gross Sum — Share — Restoration.** — Through various forms of expression, yet under the name “alimony,” statutes in a part of the States provide for transferring to the wife on the marriage dissolution a gross sum from the husband, or a share of his estate, or a reinvestment in her of what she brought into the marriage.<sup>3</sup> Other statutes ordain the like things without any mention of alimony; others add to a specific provision for alimony the division or restoration of property, or both.<sup>4</sup> Now, —

§ 1052. **Interpretations.** — The ordinary rules for the interpretation of this sort of enactment are stated in the last chapter. Added to which we have the consideration that both natural reason and the unwritten law, from neither of which should interpretation needlessly depart,<sup>5</sup> forbid one to derive a benefit to himself from inflicting an injury on another. By the act of marriage the man undertakes to support the woman during the joint lives

<sup>1</sup> Ante, § 1041, 1042.

<sup>2</sup> Ante, § 1042.

<sup>3</sup> For example, *Parsons v. Parsons*, 9 N. H. 309, 32 Am. D. 362; *Sheafe v. Sheafe*, 4 Fost. N. H. 564; *Lyon v. Lyon*, 21 Conn. 185, 197; *Piatt v. Piatt*, 9 Ohio, 37.

<sup>4</sup> And see *Boggers v. Boggers*, 6 Baxter, 299; *Blue v. Blue*, 38 Ill. 9, 87 Am. D. 267; *Calame v. Calame*, 9 C. E. Green, 440.

<sup>5</sup> *Bishop Written Laws*, § 82, 88, 119, 142, 155.

of the two. He cannot free himself from this obligation by breaking his marriage vow in some other respect. Therefore a statute which gives her a dissolution for such other violation of it should not be interpreted, unless express words unavoidably require, as working his discharge from his duty of support in recompense for his own wrong inflicted on her. To illustrate, —

§ 1053. **English Interpretation.** — The English Divorce Act, as to dissolutions, does not contain the word “alimony,”<sup>1</sup> but it authorizes an “order that the husband shall to the satisfaction of the court secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable,” &c.<sup>2</sup> Thereupon it was at first considered by the judge ordinary that though this statute permits alimony,<sup>3</sup> it should be made small, not being controlled as to the amount by the ecclesiastical practice.<sup>4</sup> But afterward the better view was adopted, that this dissolution alimony should be the same as though the divorce was from bed and board. Said Sir J. P. Wilde: “The needs of the wife and the wrong of the husband are the same in both cases. In both cases the husband has of his own wrong and wickedness thrust forth his wife from the position of participator in his station and means. Obligated in both cases to withdraw from his home, she is, without any fault of her own, deprived of her fair and reasonable share of such necessities and comforts as lay at his command. Why should not the husband’s purse be called upon to meet both cases alike? It has been said that in one case she remains a wife, and in the other she does not. This remark would carry great weight if the provision were intended to continue in the event of her second marriage; but it can hardly affect the rate of allowance made and continued so long only as the wife remains chaste and unmarried. . . . A very large number of the divorce cases since the act have been petitions by the wife for cruelty and adultery, or desertion and adultery. And among certain classes of the community a very common case indeed is that of a young husband,

<sup>1</sup> Ante, § 1042.

<sup>2</sup> 20 & 21 Vict. c. 85, § 32.

<sup>3</sup> Ante, § 1042, 1043.

<sup>4</sup> Fisher v. Fisher, 2 Swab. & T. 410,

413, 414; Ratcliff v. Ratcliff, 1 Swab. & T. 467, 474; Winstone v. Winstone, 2 Swab. & T. 246.

who, either not agreeing with his wife or getting tired of her shortly after marriage, endeavors to shake her off. In this endeavor he generally begins by treating her with neglect and contempt, often half-starves her, often beats her, often insults her by open adultery, and ends by deserting her and cohabiting with another woman. That the wife should desire a divorce in such a case can hardly be a matter of surprise, and that she should obtain it is but bare justice. But it is the very thing that the husband wants too. He has succeeded in shaking off the obligations of marriage, and that by his own voluntary breach of them. And if he can part with his wife at the door of the Divorce Court without any obligation to support her, and with full liberty to form a new connection, his triumph over the sacred permanence of marriage will have been complete. . . . No man should, in my judgment, be permitted to rid himself of his wife by ill-treatment, and at the same time escape the obligation of supporting her.”<sup>1</sup> This case, not appealed from, seems to have been accepted as settling the doctrine in England.<sup>2</sup>

§ 1054. **With us**—the course of adjudication has been much as in England. Something like the earlier English idea has governed the cases in a few of our States,<sup>3</sup> partly influenced by the particular statutory terms, and partly by the different natures of the two sorts of divorce. On the other hand, the matter-of-course practice in most of our States has been to apply the alimony rules of the unwritten law, as developed in the divorce from bed and board, to the dissolution alimony. So that a considerable proportion of the cases cited in the chapter before the last, to the amount of alimony under the unwritten rule, were in fact for dissolution. And we have direct American authority for the same thing; namely, that a judicial discretion conferred by statute to grant alimony on a decree dissolving the marriage should be exercised by the court on the same principles as the like discretion where the divorce is from bed and board.<sup>4</sup> For example, when under statutory authorization this dissolution

<sup>1</sup> *Sidney v. Sidney*, 4 Swab. & T. 178.

<sup>2</sup> *Browne Div.* 4th ed. 189; *Browne & P. Div.* 242.

<sup>3</sup> *Smith v. Smith*, 45 Ala. 264, 268; *Chunn v. Chunn*, Meigs, 131, 134; *Chenault v. Chenault*, 5 Sneed, 248; *Boggers v. Boggers*, 6 Baxter, 299. In connection

with these cases, the reader may consult *Madison v. Madison*, 1 Wash. 60; *Plaster v. Plaster*, 47 Ill. 290; *Robinson v. Robinson*, 7 Humph. 440, and *Payne v. Payne*, 4 Humph. 500, 40 Am. D. 660.

<sup>4</sup> Ante, § 1041; *Harris v. Harris*, 31 Grat. 13.

alimony is given in gross,<sup>1</sup> it, following the rule in common alimony,<sup>2</sup> will not ordinarily be permitted to exceed one half of the estate.<sup>3</sup> Still, —

§ 1055. **Apparent Qualifications.** — It is impossible to ignore the truth that the two sorts of divorce leave the parties in dissimilar mutual relations, and produce different effects upon the property-rights which were theirs before.<sup>4</sup> This fact does not call for new rules, but for new applications of the old ones. If, on the dissolution of a marriage by divorce, the common law or a statute, or a decree of the court, restores to the wife or otherwise vests in her, or brings under her control, property out of which she can have her due support, she is by the rules of the unwritten law entitled to no annual allowance,<sup>5</sup> and this is not the less so though the bed-and-board divorce would not have given her this property. Not greatly different is what may come from her —

§ 1056. **Right to Remarry.** — The mere fact that the law permits the woman to remarry does not modify her needs or the duty of her late husband, so long as she does not act upon the right.<sup>6</sup> If she marries a man who supports her, the common-law reasoning stated in the last section takes the alimony from her. Hereupon, —

§ 1057. **Decree as to Remarriage.** — Under the English statute before quoted,<sup>7</sup> the court deems itself authorized in its discretion, and exercises the authority or not according to the circumstances of the particular case, to insert in the decree for alimony the clause that it shall continue only *dum sola et casta vixerit*.<sup>8</sup> But the author is not aware that this limitation in discouragement of marriage has been inserted in any of our American decrees. And still, —

§ 1058. **Reduction on Remarriage.** — In States and under forms of the decree allowing applications to change the alimony,<sup>9</sup> the woman's marriage to a man who supports her — thus by the

<sup>1</sup> Ante, § 835, 1045, 1051.

<sup>2</sup> Ante, § 1033.

<sup>3</sup> McCartin v. McCartin, 37 Mo. Ap. 471.

<sup>4</sup> Boggess v. Boggess, 6 Baxter, 299.

<sup>5</sup> Ante, § 831-833.

<sup>6</sup> Ante, § 1053.

<sup>7</sup> Ante, § 1053.

<sup>8</sup> Lister v. Lister, 14 P. D. 175, 15 P. D. 4; Medley v. Medley, 7 P. D. 122; Bradley v. Bradley, 7 P. D. 237; Sidney v. Sidney, 4 Swab. & T. 178; Gladstone v. Gladstone, 1 P. D. 442; Chetwynd v. Chetwynd, Law Rep. 1 P. & M. 39.

<sup>9</sup> Ante, § 869-881.

principles of the unwritten law leaving her with a reduced or no claim on the former husband<sup>1</sup>—will justify the court, on request of the latter, in lessening or taking away the allowance.<sup>2</sup> But a remarriage alone, to a man too poor to contribute to her maintenance, will not have this effect.<sup>3</sup> Not quite in harmony with this view—

§ 1059. **Remarriage terminating Alimony.**—In one case, a woman who had an alimony decree remarried, whereupon she ceased attempting to collect her payments; then the second husband died, and she applied to the court to enforce the decree, but was refused. The court seems to have deemed the decree annulled by the second marriage.<sup>4</sup> It is difficult to see how an innocent act *in pais*, approved by the law, and injurious to no person, for such was the second marriage, could obliterate the judgment of a court.

§ 1060. **Vested.**—Interests which the dissolution has left vested in the wife, whether obtained through the decree or in any other way, are not divested by her lapsing into immorality, or by her marrying again.<sup>5</sup> And—

§ 1061. **Alimony as Vested.**—There are States in which alimony is regarded as a portion of the husband's estate, made by the decree to vest in the wife, or a mere ordinary debt from him to her.<sup>6</sup> Under this view of the law, plainly there can be no revision of the decree, and no forfeiture by the woman through remarriage or misconduct.<sup>7</sup> In this way, alimony under the New York statute, which empowers the court "to provide such suitable allowance to the complainant for her support as the court shall deem just, having regard to the circumstances of the parties respectively," is, when once ordered, final.<sup>8</sup> It will be affected neither by the woman's fornication<sup>9</sup> nor by her taking another husband.<sup>10</sup>

<sup>1</sup> Ante, § 832, 1056.

<sup>2</sup> *Olney v. Watts*, 43 Ohio St. 499; *Albee v. Wyman*, 10 Gray, 222, 230.

<sup>3</sup> *Stillman v. Stillman*, 7 Bradw. 524.

<sup>4</sup> *Bowman v. Worthington*, 24 Ark. 522, 538; referring to *Albee v. Wyman*, 10 Gray, 222, and to *Fisher v. Fisher*, 2 Swab. & T. 410, and *Sidney v. Sidney*, 4 Swab. & T. 178.

<sup>5</sup> *Gladstone v. Gladstone*, 1 P. D. 442.

<sup>6</sup> *Miller v. Clark*, 23 Ind. 370. And see ante, § 1001.

<sup>7</sup> *Forrest v. Forrest*, 3 Bosw. 661.

<sup>8</sup> *Kamp v. Kamp*, 59 N. Y. 212; *Park c. Park*, 18 Hun, 466.

<sup>9</sup> *Forrest v. Forrest*, 3 Bosw. 661, 693, 694, 698, 699, opinion by Bosworth, C. J.; *Forrest v. Forrest*, 8 Bosw. 640; *Forrest v. Forrest*, 25 N. Y. 501. Compare this case with *Griffin v. Griffin*, 23 How. Pr. 189, 21 Ib. 364, 47 N. Y. 134.

<sup>10</sup> *Shepherd v. Shepherd*, 3 Thomp. & C. 715, 1 Hun, 240. Compare with *Ryer v. Ryer*, 67 How. Pr. 369.

§ 1062. **Further Views.** — The substantial identity of the alimony of this chapter with that of the unwritten law discloses the relevancy to this subject of the elucidations of the various other chapters of the present Book. So that in those other chapters the reader will find the needful further views. Still, —

§ 1063. **The Outer Limits** — of the injured wife's alimony rights, as derived from the reasons of the law, have not in perhaps every particular been recognized by the courts, though on the whole judicial justice has not lagged far behind natural justice. As, in reason, applicable to dissolution alimony, we have the following, which has received judicial approval; namely, —

§ 1064. **Some of the Principles** — which, in reason, should govern dissolution alimony are the following: (1) The innocent party should not be left to suffer pecuniarily for having been compelled, by the ill conduct of the other, to seek the divorce; (2) The wife, made thus in effect a widow, should not ordinarily be set back simply where she stood in property when she entered the marriage; she has given her time, her virginity, her earlier bloom, where she has been rewarded with ill faith in return for her faith; (3) She should not stand worse than if death, instead of divorce, had dissolved the connection.<sup>1</sup>

§ 1065. *The Doctrine of this Chapter restated.*

The alimony of marriage dissolution is a creature of statutes. But when a statute has created it, without specifically defining its nature, it takes the nature of the common-law alimony, wherefrom it differs only as to particulars for which the statute has made a different provision. Marriage involves an undertaking by the husband to support the wife during the joint lives of the two, and he cannot relieve himself of this obligation by an act of his own wrong. If he commits a dereliction justifying a judicial separation on her prayer, the unwritten law compels him to aliment her. If the dereliction justifies a dissolution, the case is unknown to the unwritten law. But if the statute directs him to aliment her, the reason of the unwritten law controls its interpretation, and he must pay the same alimony as if the divorce were from bed and board. Upon either divorce, he furnishes only what is needful from the joint income after deducting her receipts from other sources.

<sup>1</sup> Approved by the court in *Calame v. Calame*, 9 C. E. Green, 440.



## CHAPTER XXXIV.

## THE PROCEDURE IN ALIMONY.

- § 1066. Introduction.  
 1067-1078. Pleadings as to Alimony.  
 1079-1084. The Evidence.  
 1085-1099. Practice in making and enforcing Decree.  
 1100-1113. Securing the Alimony and defeating Frauds.  
 1114. Doctrine of Chapter restated.

§ 1066. **How Chapter divided.**—We shall consider, I. The Pleadings as to Alimony; II. The Evidence as to Alimony; III. The Practice in making and enforcing the Decree; IV. Securing the Alimony and defeating Frauds thereon.

I. *The Pleadings as to Alimony.*

§ 1067. **Complaint and Answer.**—By the English and better American practice, the proceeding for alimony is strictly ancillary.<sup>1</sup> Neither the complaining wife's libel or petition nor the husband's answer thereto makes any mention of her alimony or his faculties.<sup>2</sup> In some of our States the entire divorce practice is loose,<sup>3</sup> and in this particular not well defined in books accessible to the general inquirer. But not unfrequently our libel makes some mention of the husband's ability to pay alimony, or, at least, contains a prayer for it when really sought.<sup>4</sup> It does not follow from a court's tolerating an inconvenient practice, or one in principle inadequate, that it would not approve what is better.<sup>5</sup>

§ 1068. **Applied for.**—Like anything else, alimony if wanted must be applied for, it will not be given otherwise.<sup>6</sup> And the

<sup>1</sup> Ante, § 822-824.

<sup>2</sup> Ante, § 576, 577, 579; Browne Div. Pract. 4th ed. 586, 596-598.

<sup>3</sup> Ante, § 644.

<sup>4</sup> For example, ante, § 578; Pain v.

Pain, 80 N. C. 322; Damon v. Damon, 28 Wis. 510; Becker v. Becker, 15 Bradw. 247.

<sup>5</sup> Becker v. Becker, supra.

<sup>6</sup> Chandler v. Chandler, 13 Ind. 492.

application must be to the court acting in the divorce cause, not to any other.<sup>1</sup>

§ 1069. **When** — we have seen in general.<sup>2</sup> And as a question of practical convenience, while the application for temporary alimony should be prompt, it is better to postpone that for permanent until it is found by the court or jury that there is to be a divorce.<sup>3</sup> It has even been suggested that until such finding there is no jurisdiction over the question of permanent alimony.<sup>4</sup>

§ 1070. **Motion — Petition — Allegation of Marriage.** — The form of the application will depend upon the condition of the pleadings and the practice of the particular court; as, by motion<sup>5</sup> or petition.<sup>6</sup> The necessary allegation of the marriage appears in the libel,<sup>7</sup> that of the husband's faculties<sup>8</sup> should properly<sup>9</sup> be made in a supplemental ancillary pleading, which in the ecclesiastical practice<sup>10</sup> was denominated the —

§ 1071. **Allegation of Faculties.** — This allegation, by this name, is sometimes employed also in our American practice.<sup>11</sup> The name is immaterial, but since the faculties must be admitted or proved before there can be alimony,<sup>12</sup> the allegation of them, by whatever name called, must in some way appear in the wife's pleadings before the court makes the allotment. Under the later English practice, this allegation is included in what is termed a —

<sup>1</sup> *Bennett v. Southard*, 35 Cal. 688. See *Bunch v. Bunch*, 26 Ind. 400.

<sup>2</sup> Ante, § 840, 955. For other cases, see *Forrest v. Forrest*, 3 Bosw. 661; *Reavis v. Reavis*, 1 Scam. 242; *Shotwell v. Shotwell*, Sm. & M. Ch. 51; *Goss v. Goss*, 29 Ga. 109; *Bankston v. Bankston*, 27 Missis. 692; *Pinckard v. Pinckard*, 23 Ga. 286; *Fletcher v. Henley*, 13 La. An. 150; *Slocum v. Slocum*, 2 Philad. 217, bottom paging; *Dwelly v. Dwelly*, 46 Me. 377; *Shaw v. Shaw*, 9 Mich. 164; *Van Duzer v. Van Duzer*, 65 Iowa, 625; *Butler v. Butler*, 11 Stew. Ch. 626.

<sup>3</sup> Ante, § 871; post, § 1085.

<sup>4</sup> *Bradley v. Bradley*, 3 P. D. 47, 50; *Sidney v. Sidney*, 36 Law J. N. S. Mat. 73, 74, the House of Lords overruling Law Rep. 1 P. & M. 78. That permanent alimony may be applied for between the decree *nisi* and the final decree was decided in *Charles v. Charles*, Law Rep. 1 P. & M. 260.

<sup>5</sup> *McGee v. McGee*, 10 Ga. 477, 489, opinion by Nisbet, J.; *Becker v. Becker*, 15 Bradw. 247. And see *Roseberry v. Roseberry*, 17 Ga. 139; *Swearingen v. Swearingen*, 19 Ga. 265.

<sup>6</sup> *Longfellow v. Longfellow*, Clarke, 344. And see *Mix v. Mix*, 1 Johns. Ch. 108; *Culver v. Culver*, 8 B. Monr. 128; *Lewis v. Lewis*, 3 Johns. Ch. 519; *Osgood v. Osgood*, 2 Paige, 621; *Bray v. Bray*, 2 Halst. Ch. 27.

<sup>7</sup> Ante, § 604-611.

<sup>8</sup> Ante, § 888.

<sup>9</sup> Ante, § 1067.

<sup>10</sup> Ante, § 459; Coote Ec. Pract. 339, 341.

<sup>11</sup> *Lovett v. Lovett*, 11 Ala. 763; *Kendall v. Kendall*, 1 Barb. Ch. 610; *Wright v. Wright*, 3 Tex. 168.

<sup>12</sup> Ante, § 931, 935; post, § 1084.

§ 1072. "**Petition for Alimony.**"—The form of this petition is established by the judges, and is as well adapted to general use in our courts wherein the actual practice varies, as any other.<sup>1</sup> It is—

To the Right Honorable the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice.

A. B. against C. B. and R. S.

The day of , 18 .

The Petition of C B., the lawful wife of A. B., sheweth,—

1. That the said A. B. does now carry on and has for many years past carried on the business of a at , and from such business he derives the net annual income of £ :
2. That the said A. B. is now or lately was possessed of or entitled to proprietary shares of the Railway Company, amounting in value to £ , and yielding a clear annual dividend of £ :
3. That the said A. B. is possessed of certain stock-in-trade in his said business of a of the value of £ .

[In same manner state particulars of any other property which the husband may possess.]

Your Petitioner therefore humbly prays,—

That your Lordship will be pleased to decree her such sum or sums of money by way of alimony *pendente lite* [or permanent alimony] as to your Lordship shall seem meet.<sup>2</sup>

§ 1073. **The Answer**—to this allegation is required by a rule of court to be on oath.<sup>3</sup> And the rule<sup>4</sup> permits the wife, if not satisfied with it, to compel fuller answers, or to examine him as a witness to his faculties.<sup>5</sup> No form of the answer is prescribed by the judges, but the following is from a book of English practice:—

I, the said A. B., of , in the county of , make oath and say:—

1. In answer to the first paragraph of the said petition, I admit that I do carry on and have for years past carried on the business of a at as in the said first paragraph alleged, but I say that I derive from the said business the gross annual income of £ and no more, and that such gross annual income is subject to the following annual deductions necessarily incurred in and about ac-

<sup>1</sup> Ante, § 575, 576.

<sup>2</sup> Weekly Notes for Oct. 16, 1880, p. 486; Browne Div. Pract. 4th ed. 590; Browne & P. Div. 607.

<sup>3</sup> Constable v. Constable, Law Rep. 2 P. & M. 17.

<sup>4</sup> Rule 86, Law Rep. 1 P. & M. 756.

<sup>5</sup> Anderson v. Anderson, Law Rep. 1 P. & M. 512; Jennings v. Jennings, Law Rep. 1 P. & M. 35; Nokes v. Nokes, 3 Swab. & T. 529; Williams v. Williams, Law Rep. 1 P. & M. 370.

quiring the said income, that is to say: £        for rent, £        for gas, &c., &c. [*according to the facts*]:

2. In answer to the second paragraph of the said petition, I admit that I am possessed of the said shares in the second paragraph mentioned, but I deny that they yield a clear annual dividend of £        or any annual dividend whatever, the same being now of no value:
3. In answer to the third paragraph of the said petition, I say that the stock-in-trade in my said business, of which I am possessed, is of the value of £       , and not of the value of £        as in the said third paragraph alleged:
4. I say that I have no other property or source of income whatsoever than as is in this my answer above set out:
5. I say that my said wife C. B. is possessed of or entitled to [*here state any separate property to which the wife may be entitled.*]

A. B.

Sworn at

Before me, P. Q.

A commissioner to administer oaths, &c.<sup>1</sup>

§ 1074. **Minuteness of Inquiry — (Partnership).** — It is commonly a practical question, pertaining to the individual case, how far the allegation of faculties should descend to particulars, — the end being to ascertain the income. And exposure of the private affairs of third persons should not be needlessly compelled. Thus where the husband is a partner with others, the wife according to ecclesiastical authority should not plead the particulars of the partnership business; such as the number of hands employed, the amount of the annual returns, the capital embarked by the firm, the stock in trade, and the debts due. She is simply to state her husband's income, or the income of the firm with the proportion to which he is entitled.<sup>2</sup> But if the husband does business alone, the inquiry may descend more into the particulars. For example, where she alleged an income of £200 a year, and he answered that "after payment of workmen and assistants' wages, cost of gas, and renewal of plant and tools," it was "£130, less income tax," the Divorce Court directed the answer to be amended "by stating the amount of the gross income derived from the business, and specifying the deductions."<sup>3</sup>

§ 1075. **Two Allegations or One — When — (Temporary — Permanent).** — The allegation of faculties should be made while the

<sup>1</sup> Browne & P. Div. 620.

Eng. Ec. 186. And see *Brisco v. Brisco*,

<sup>2</sup> *Higgs v. Higgs*, 3 Hag. Ec. 472, 5

2 Hag. Con. 199.

<sup>3</sup> *Nokes v. Nokes*, 3 Swab. & T. 529.

suit is in progress; but in the absence of any special direction therein, or general rule of court, there would appear to be no objection to receiving it at any time before the question is acted upon.<sup>1</sup> By the practice of the Divorce Court, which so far as the writer can discover follows that of the ecclesiastical, there are not ordinarily two allegations of faculties, one for temporary alimony and the other for permanent; but if the faculties have been duly established on the former, the permanent alimony is applied for on simple motion.<sup>2</sup> Yet if the wife relies on a subsequent increase of faculties, she presents her petition accordingly.<sup>3</sup> If the husband claims a diminution, he may disclose the fact by affidavit.<sup>4</sup> But often the allowance of temporary alimony will be made without a sufficient establishment of the faculties for permanent, or it will be made by consent. The needful variations of the practice to meet such a case will be obvious.

§ 1076. **Divorce granted and Suit ended.** — We have seen what is the doctrine, or its obscurities, as to the rights of the wife if the divorce is granted and the term of the court closes without any mention of alimony.<sup>5</sup> Contrary to just principle, and to the law derived from England by our forefathers, there is a tendency in considerable numbers of our courts to deem the application now too late;<sup>6</sup> unless, as in some of the States, it is saved by a statute,<sup>7</sup> or by a reservation in the decree.<sup>8</sup> In form, the application should not be by an original bill or proceeding, but by a supplemental petition in the cause wherein the divorce was decreed.<sup>9</sup> Notice thereof should be served on the defendant.<sup>10</sup>

<sup>1</sup> *Lovett v. Lovett*, 11 Ala. 763, 771; *Kendall v. Kendall*, 1 Barb. Ch. 610, 612. See also *Wright v. Wright*, 3 Tex. 168; *Litowich v. Litowich*, 19 Kan. 451, 27 Am. R. 145; *Scoggins v. Scoggins*, 85 N. C. 347.

<sup>2</sup> Rules 91, 190, 191.

<sup>3</sup> *Fisk v. Fisk*, 31 Law J. n. s. Mat. 60.

<sup>4</sup> *Davies v. Davies*, 32 Law J. n. s. Mat. 152. See *Browne Div. Pract.* 4th ed. 191; *Cox v. Cox*, 3 Add. Ec. 276, 2 Eng. Ec. 531.

<sup>5</sup> Ante, § 839-851, 869-881.

<sup>6</sup> *Henderson v. Henderson*, 64 Me. 419; *Kamp v. Kamp*, 59 N. Y. 212. And see *Wilde v. Wilde*, 36 Iowa, 319; *Cook v. Cook*, 1 Barb. Ch. 639, 644; *Lawson v.*

*Shotwell*, 27 Missis. 630; *Winstone v. Winstone*, 2 Swab. & T. 246; *Shotwell v. Shotwell*, Sm. & M. Ch. 51; *Forrest v. Forrest*, 3 Bosw. 661; *Bowman v. Worthington*, 24 Ark. 522; *Bankston v. Bankston*, 27 Missis. 692. But see *Sheafe v. Loughton*, 36 N. H. 240, 243.

<sup>7</sup> Ante, § 874; Mass. Gen. Stats. c. 107, § 48; *Ela v. Ela*, 63 N. H. 116.

<sup>8</sup> Ante, § 875; *Cooledge v. Cooledge*, 1 Barb. Ch. 77.

<sup>9</sup> *Snover v. Snover*, 2 Beasley, 261; *Paff v. Paff*, Hopkins, 584; *Neil v. Neil*, 4 Hag. Ec. 273.

<sup>10</sup> *Covell v. Covell*, Law Rep. 2 P. & M. 411.

Alimony being an incident to the divorce suit, it need not be mentioned in the original citation.<sup>1</sup> So —

§ 1077. **Modifying.** — The application to increase or diminish the amount of alimony<sup>2</sup> is to be made by summary motion, or petition in the original cause, not by a new proceeding.<sup>3</sup> It must sufficiently set forth the facts relied on.<sup>4</sup> And —

§ 1078. **Death.** — Like an original divorce suit, it abates with the death of a party.<sup>5</sup>

## II. *The Evidence as to Alimony.*

§ 1079. **The Burden of Proof** — of the facts authorizing alimony is upon the wife.<sup>6</sup> But —

§ 1080. **Admissions.** — The question of the husband's faculties is not within the reason, therefore not within the rule,<sup>7</sup> which renders the mere unaided confessions or admissions of a party inadequate in evidence.<sup>8</sup> Consequently the leading evidence in these cases is the husband's admissions. To procure which, —

§ 1081. **Answers on Oath.** — The ecclesiastical practice compelled the husband to disclose his faculties under oath,<sup>9</sup> and we have seen that it is so also in the later Divorce Court.<sup>10</sup> With us, the practice is not uniform; but in principle the husband's answer to the wife's allegation of faculties ought always to be on oath, especially if she requests it, since it was so in England when we received thence our unwritten law, and since disclosures on oath are particularly adapted to facilitate this proceeding.

§ 1082. **Effect of Answer.** — Whether the answer is sworn to or not, the wife is not obliged to accept it, she may produce further testimony, or rely on the answer, as she pleases.<sup>11</sup> Commonly she accepts it when sworn to, and thus the question of

<sup>1</sup> *McEwen v. McEwen*, 26 Iowa, 375.  
And see *Sanchez v. Sanchez*, 21 Fla. 346.

<sup>2</sup> Ante, § 869-881.

<sup>3</sup> *Bauman v. Bauman*, 18 Ark. 320, 333, 68 Am. D. 171. And see *McPike v. McPike*, 10 Bradw. 332.

<sup>4</sup> *Perkins v. Perkins*, 12 Mich. 456; *Saunders v. Saunders*, 1 Swab. & T. 72, 73; *Shirley v. Wardrop*, 1 Swab. & T. 317.

<sup>5</sup> Ante, § 687, 836, 858; *O'Hagan v. Executor*, 4 Iowa, 509.

<sup>6</sup> *Glasscock v. Glasscock*, 94 Ind. 163.

<sup>7</sup> Ante, § 707-729.

<sup>8</sup> Compare with ante, § 882-886.

<sup>9</sup> Ante, § 452, 459.

<sup>10</sup> Ante, § 1073; *Snowdon v. Snowdon*, Law Rep. 2 P. & M. 200; *Mumby v. Mumby*, Law Rep. 1 P. & M. 701; *Constable v. Constable*, Law Rep. 2 P. & M. 17.

<sup>11</sup> *Brisco v. Brisco*, 2 Hag. Con. 199; *Higgs v. Higgs*, 3 Hag. Ec. 472, 5 Eng. Ec. 186; *Durant v. Durant*, 1 Hag. Ec. 528, 3 Eng. Ec. 231; *Westmeath v. Westmeath*, 3 Knapp, 42.

the faculties is readily settled.<sup>1</sup> It is construed most strongly against the husband,<sup>2</sup> and he is presumed to have made all needful deductions in his own favor.<sup>3</sup>

§ 1083. **Referring.** — Courts that refer questions of fact to an officer for a preliminary hearing, often refer, or refuse to refer, this one of the husband's faculties, according to the aspects of the particular case, and their common practice. In equity the reference is to a master.<sup>4</sup> At law, in some of our States, it is to a commissioner or referee of the court.<sup>5</sup>

§ 1084. **Marriage and Faculties.** — That both the alleged marriage<sup>6</sup> and faculties<sup>7</sup> must be admitted or proved before there can be alimony we have already seen. The proof of the faculties appears in this sub-title, that of the marriage in a preceding chapter.<sup>8</sup>

### III. *The Practice in making and enforcing the Decree.*

§ 1085. **Term of Court.** — Assuming that the question of divorce is by the court heard in advance of that of alimony,<sup>9</sup> the divorce may be decreed at one term and the case continued, then the permanent alimony may be settled at a future term.<sup>10</sup>

§ 1086. **Questions of Practice** — in making the decree are more or less considered in other connections. They vary with the State and tribunal. So a reference to a few cases will suffice for this place.<sup>11</sup>

<sup>1</sup> *Brisco v. Brisco*, 2 Hag. Con. 199; *Higgs v. Higgs*, 3 Hag. Ec. 472; *Durant v. Durant*, 1 Hag. Ec. 528.

<sup>2</sup> *Robinson v. Robinson*, 2 Lee, 593, 594, 6 Eng. Ec. 255.

<sup>3</sup> *Rees v. Rees*, 3 Phillim. 387, 391, 1 Eng. Ec. 418, 419.

<sup>4</sup> *Mulock v. Mulock*, 1 Edw. Ch. 14; *Gerard v. Gerard*, 2 Barb. Ch. 73. See also *Forrest v. Forrest*, 6 Duer, 102; *Peckford v. Peckford*, 1 Paige, 274; *Barrere v. Barrere*, 4 Johns. Ch. 187; *Amos v. Amos*, 3 Green Ch. 171, 172; *Snover v. Snover*, 2 Stock. 261, 262; *Miller v. Miller*, Saxton, 386; *Richmond v. Richmond*, 1 Green Ch. 90; *Bray v. Bray*, 2 Halst. Ch. 27; *Soules v. Soules*, 3 Grant Ch., U. C. 113, 121.

<sup>5</sup> *Brotherton v. Brotherton*, 12 Neb. 75. And see *Forrest v. Forrest*, 8 Bosw. 640;

*Forrest v. Forrest*, 3 Bosw. 661; *Forrest v. Forrest*, 25 N. Y. 501; *Shaw v. Shaw*, 9 Mich. 164.

<sup>6</sup> *Mitchell v. Mitchell*, 1 Spiuks, 102; *Roseberry v. Roseberry*, 17 Ga. 139. And see *Kline v. Kline*, 1 Philad. 383, bottom paging; *Farwell v. Farwell*, 31 Me. 591; *Schmidt v. Schmidt*, 26 Mo. 235.

<sup>7</sup> *Wright v. Wright*, 3 Tex. 168.

<sup>8</sup> Ante, § 731-758.

<sup>9</sup> Ante, § 871, 1069.

<sup>10</sup> *Prescott v. Prescott*, 59 Me. 146, 151.

<sup>11</sup> *Ifert v. Ifert*, 29 Ind. 473; *Taylor v. Taylor*, 25 Ohio St. 71; *Galinger v. Galinger*, 4 Lans. 473, 61 Barb. 31; *Taylor v. Gladwin*, 40 Mich. 232; *Hoffman v. Hoffman*, 55 Barb. 269; *Merrick v. Merrick*, 5 Mo. Ap. 123; *Bradley v. Bradley*, 45 Ind. 67; *Wardlaw v. Wardlaw*, 39 Ga. 53; *Winemiller v. Winemiller*, 114 Ind. 540.

§ 1087. **Appeals** — from the alimony decree are differently allowed, with different effects, in the several States.<sup>1</sup> And —

§ 1088. **Restitution.** — It has been held that on the reversal of a decree for alimony, there may be a writ for the restitution of money paid thereon.<sup>2</sup> The principal questions under this subtitle relate to the —

§ 1089. *Methods of enforcing the Decree:* —

**Various.** — These methods vary in the States. And largely the same court may elect between them.<sup>3</sup> The leading ones, the particulars whereof vary also, are —

§ 1090. **Excommunication** — was under the unwritten law of England the strong arm of the ecclesiastical courts.<sup>4</sup> A husband who would not pay the alimony was excommunicated.<sup>5</sup> But —

§ 1091. **Chancery Contempt.** — In 1813, by 53 Geo. 3, c. 127, excommunication for civil purposes was forbidden to the ecclesiastical courts; instead of which, one in contempt for disobedience to an order or decree was to be certified to the Court of Chancery, and from the latter tribunal the writ *de contumace capiendo* issued for his imprisonment.<sup>6</sup> The later Divorce Court was directed by the statute to enforce its orders after the chancery practice.<sup>7</sup> So that until methods which have taken the place of this one came more into use, it was the leading course in English divorce cases to enforce the decree for alimony by attachment.<sup>8</sup> And —

§ 1092. **The Attachment for Contempt** — is a prominent method for enforcing the alimony decree with us.<sup>9</sup> This proceed-

<sup>1</sup> Ante, § 685, 686; *Galusha v. Galusha*, 108 N. Y. 114; *Cralle v. Cralle*, 84 Va. 198; *Froman v. Froman*, 53 Mich. 581; *Peck v. Peck*, 113 Ind. 168; *Varney v. Varney*, 58 Wis. 19; *McBride v. McBride*, 119 N. Y. 519; *Golding v. Golding*, 74 Mo. 123; *Sharon v. Sharon*, 68 Cal. 326; *Taylor v. Gladwin*, 40 Mich. 232; *Gordon v. Gordon*, 88 N. C. 45, 43 Am. R. 729; *Ross v. Griffin*, 53 Mich. 5.

<sup>2</sup> *Mullin v. Mullin*, 60 N. H. 16.

<sup>3</sup> *Becker v. Becker*, 15 Bradw. 247.

<sup>4</sup> See Shelf. Mar. & Div. 494 et seq.

<sup>5</sup> 2 Burn Ec. Law, 506.

<sup>6</sup> *Hamerton v. Hamerton*, 1 Hag. Ec. 23, 3 Eng. Ec. 17; *Greenhill v. Greenhill*, 1 Curt. Ec. 462, 6 Eng. Ec. 376.

<sup>7</sup> 20 & 21 Vict. c. 85, § 52; *Ex parte Holden*, 13 C. B. n. s. 641.

<sup>8</sup> *Ward v. Ward*, 1 Swab. & T. 484; *Alexander v. Alexander*, 2 Swab. & T. 385; *Bremner v. Bremner*, 3 Swab. & T. 378; *Nicholls v. Nicholls*, 2 Swab. & T. 637; *Holland v. Holland*, 4 Swab. & T. 78; *Dickens v. Dickens*, 2 Swab. & T. 521; *Pearson v. Pearson*, 2 Swab. & T. 546; *Parr v. Parr*, 4 Swab. & T. 229; *Watts v. Watts*, 4 Swab. & T. 274; *Thomas v. Thomas*, 2 Swab. & T. 64; *Davies v. Davies*, 2 Swab. & T. 437; *Hepworth v. Hepworth*, 2 Swab. & T. 414; *Busby v. Busby*, 2 Swab. & T. 383; *De Lossy v. De Lossy*, 15 P. D. 115.

<sup>9</sup> *Gerard v. Gerard*, 2 Barb. Ch. 73; *Errissman v. Errissman*, 25 Ill. 136; *Steller v. Steller*, 25 Mich. 159; *O'Haley v. O'Haley*, 31 Tex. 502; *Haines v. Haines*, 35 Mich. 138; *Blake v. P.* 80 Ill. 11; *Lan-*



ing<sup>1</sup> partakes of the criminal quality,<sup>2</sup> therefore the attachment does not issue as of course like an execution, but only on due notice of the award and on demand of payment,<sup>3</sup> unless a prior refusal<sup>4</sup> or something else renders them unnecessary. And one who cannot pay,<sup>5</sup> if not otherwise in fault about the matter,<sup>6</sup> will not be imprisoned under this process.<sup>7</sup> Various circumstances and conditions of the law will require its rejection in favor of some other method.<sup>8</sup>

§ 1093. **Sequestration**—is by some courts and in some circumstances resorted to.<sup>9</sup>

§ 1094. **Execution.**—In some courts, an execution, or series of executions, may be issued for the alimony ordered, whether temporary or permanent.<sup>10</sup>

sing *v. Lansing*, 4 Lans. 377, 41 How. Pr. 248; *Galland v. Galland*, 44 Cal. 475, 13 Am. R. 167; *North v. North*, 39 Mich. 67; *Groves's Appeal*, 68 Pa. 143; *Grimm v. Grimm*, 1 E. D. Smith, 190; *Ormsby v. Ormsby*, 1 Philad. 578, bottom paging; *Ex parte Perkins*, 18 Cal. 60; *Dwelly v. Dwelly*, 46 Me. 377; *Pinckard v. Pinckard*, 23 Ga. 286; *Strobridge v. Strobridge*, 21 Hun, 288; *Pritchard v. Pritchard*, 4 Abb. N. Cas. 298; *Haines v. Haines*, 35 Mich. 138; *Waldron v. Waldron*, 55 Pa. 231; *Wood v. Wood*, Phillips, N. C. 538; *In re Bissell*, 40 Mich. 63; *Buck v. Buck*, 60 Ill. 105; *Brown v. Brown*, 22 Mich. 299; *Blake v. Blake*, 80 Ill. 523; *Russell v. Russell*, 69 Me. 336; *Andrews v. Andrews*, 69 Ill. 609; *O'Callaghan v. O'Callaghan*, 69 Ill. 552; *Purcell v. Purcell*, 4 Hen. & Munf. 507; *Ford v. Ford*, 10 Abb. Pr. n. s. 74, 41 How. Pr. 169; *Lansing v. Lansing*, 41 How. Pr. 248; *Carlton v. Carlton*, 44 Ga. 216; *Wightman v. Wightman*, 45 Ill. 167; *Twing v. O'Meara*, 59 Iowa, 326; *Park v. Park*, 80 N. Y. 156; *Ryer v. Ryer*, 67 How. Pr. 369; *Allen v. Allen*, 8 Abb. N. Cas. 175, 58 How. Pr. 381; *Ross v. Griffin*, 53 Mich. 5; *In re Clark*, 20 Hun, 551; *In re Fanning*, 40 Minn. 4; *Ryckman v. Ryckman*, 34 Hun, 235; *Ex parte Wilson*, 73 Cal. 97; *Isaacs v. Isaacs*, 61 How. Pr. 369.

<sup>1</sup> For a pretty full and clear exposition of the procedure by contempt, see *Petrie v. P.* 40 Ill. 334.

<sup>2</sup> 2 Bishop Crim. Law, § 241-273.

<sup>3</sup> *Edison v. Edison*, 56 Mich. 185; *Sanchez v. Sanchez*, 21 Fla. 346; *Ryckman v. Ryckman*, 32 Hun, 193.

<sup>4</sup> *Potts v. Potts*, 68 Mich. 492.

<sup>5</sup> *Lewis v. Lewis*, 80 Ga. 706, 12 Am. St. 281; *Spencer v. Lawler*, 79 Cal. 215; *S. v. Dent*, 29 Kan. 416; *Noland v. Noland*, 29 Hun, 630.

<sup>6</sup> *Ryer v. Ryer*, 33 Hun, 116.

<sup>7</sup> "Mistake, misfortune, inability from poverty, or other equivalent cause, when shown to exist, have always been held in equity a sufficient excuse for non-payment of money, or failure to comply with an order, and to purge the contempt." *Lord, C. J. in Newhouse v. Newhouse*, 14 Or. 290, 292.

<sup>8</sup> *Allen v. Allen*, 72 Iowa, 502; *Gane v. Gane*, 45 N. Y. Super. 355; *Isaacs v. Isaacs*, 10 Daly, 306; *Jacquin v. Jacquin*, 36 Hun, 378, 2 How. Pr. n. s. 206.

<sup>9</sup> *Clinton v. Clinton*, Law Rep. 1 P. & M. 215; *Dent v. Dent*, Law Rep. 1 P. & M. 366; *Sansom v. Sansom*, 4 P. D. 69; *Forrest v. Forrest*, 9 Bosw. 686; *Munt v. Munt*, 2 Swab. & T. 661; *Becker v. Becker*, 15 Bradw. 247; *Birch v. Birch*, 8 P. D. 163; *Stratton v. Stratton*, 77 Me. 373; *Hills v. Hills*, 76 Me. 486; *Donnelly v. Shaw*, 7 Abb. N. Cas. 264; *Cook v. Cook*, 15 P. D. 116.

<sup>10</sup> *Fletcher v. Henley*, 13 La. An. 150; *Schmidt v. Schmidt*, 26 Mo. 235; *Sheafe v. Sheafe*, 36 N. H. 155; *Sheafe v. Lighton*, 36 N. H. 240; *Piatt v. Piatt*, 9 Ohio, 37; *Olin v. Hungerford*, 10 Ohio, 268;

§ 1095. **Taking away Privileges in the Cause** — is sometimes employed for enforcing payment.<sup>1</sup> For example, in justifying circumstances, the court may strike out the defendant's answer,<sup>2</sup> or dismiss the plaintiff's complaint,<sup>3</sup> or refuse to proceed with the trial,<sup>4</sup> unless or until its alimony order is obeyed. Possibly some of the cases under these heads have gone too far. The interests of the public,<sup>5</sup> while not prejudiced by what delays the cause or ends it without a trial, will not permit a hearing with the channels of evidence obstructed. Therefore public policy forbids that a husband's refusal to pay temporary alimony should deprive him of the right to defend the suit.<sup>6</sup>

§ 1096. **Suit on Decree — (Debt — Scire Facias — Bill).** — The preceding chapters have shown that the decree for alimony is not in its nature precisely identical in all the States. And this difference, blended with different conceptions of the judges, extends to the remedy. In some States debt<sup>7</sup> or other similar action,<sup>8</sup> in others *scire facias*,<sup>9</sup> will lie on an alimony judgment. And we have seen that in the Supreme Court of the United States, a bill in equity was held to be well brought.<sup>10</sup> The terms of the particular decree,<sup>11</sup> and the court as being of law or equity, may influence the question. It seems to be a sort of general doctrine that money directed in equity to be paid cannot

Orrok v. Orrok, 1 Mass. 341; French v. French, 4 Mass. 587; Howard v. Howard, 15 Mass. 196; Chase v. Chase, 105 Mass. 385; Taylor v. Gladwin, 40 Mich. 232; Van Cleave v. Bucher, 79 Cal. 600; Foster v. Foster, 130 Mass. 189; Yelton v. Handley, 28 Ill. Ap. 640; Downs v. Flanders, 150 Mass. 92.

<sup>1</sup> McClung v. McClung, 40 Mich. 493; Walker v. Walker, 20 Hun, 400; McCrea v. McCrea, 58 How. Pr. 220; Walker v. Walker, 59 How. Pr. 476; Peel v. Peel, 50 Iowa, 521; Latham v. Latham, 2 Swab. & T. 299; Bird v. Bird, 1 Lee, 572, 5 Eng. Ec. 455; Cason v. Cason, 15 Ga. 405; Allen v. Allen, 72 Iowa, 502; Zimmerman v. Zimmerman, 7 Mont. 114.

<sup>2</sup> Walker v. Walker, 82 N. Y. 260, 8 Abb. N. Cas. 436, 20 Hun, 400, 59 How. Pr. 476; Quigley v. Quigley, 45 Hun, 23; Brisbane v. Brisbane, 67 How. Pr. 184.

<sup>3</sup> Casteel v. Casteel, 38 Ark. 477.

<sup>4</sup> Winter v. San Francisco Superior Court, 70 Cal. 295.

<sup>5</sup> Ante, § 496, 497, 619, 628, 631, 638, 663, 664, 704, 706.

<sup>6</sup> Baily v. Baily, 69 Iowa, 77. And see Johnson v. San Francisco Superior Court, 63 Cal. 578.

<sup>7</sup> Clark v. Clark, 6 Watts & S. 85.

<sup>8</sup> Becknell v. Becknell, 110 Ind. 42; Bates v. Bates, 74 Ga. 105; Hansford v. Van Auker, 79 Ind. 302.

<sup>9</sup> Hewitt v. Hewitt, 1 Bland, 101; Morton v. Morton, 4 Cush. 518; Chestnut v. Chestnut, 77 Ill. 346; McCracken v. Swartz, 5 Or. 62.

<sup>10</sup> Ante, § 850; Barber v. Barber, 21 How. U. S. 582, 590, 591. But see Barber v. Barber, 1 Chand. 280; Carey v. Carey, 2 Daly, 424; Perkins v. Perkins, 16 Mich. 162.

<sup>11</sup> Chestnut v. Chestnut, *supra*.

be recovered at law.<sup>1</sup> And this has been applied specially to the alimony decree rendered in a foreign jurisdiction.<sup>2</sup>

§ 1097. *Arrears of Alimony*:—

**Husband paying Debts.**—If, with the tacit consent of the wife and perhaps in some circumstances without it, the alimony runs in arrear, and the husband consequently makes disbursements on her account,<sup>3</sup> the sums disbursed will be deducted when she asks the court to enforce payment.<sup>4</sup> And—

§ 1098. **How long Arrears.**—As this allowance is for the wife's maintenance from year to year,<sup>5</sup> the court will not ordinarily compel payment beyond a year prior to the application, unless some explanation of the delay is made or appears.<sup>6</sup> This is the rule in pin-money,<sup>7</sup> which alimony in some measure resembles.

§ 1099. **How compel.**—The course is to apply to the court in which the decree was rendered for such process as the nature of the case, the terms of the decree, the particular constitution of the tribunal, or the statutes require.<sup>8</sup> The application should be in the original suit. Consequently it need not be commenced or carried on in the formal manner of an original proceeding.<sup>9</sup>

#### IV. *Securing the Alimony and defeating Frauds thereon.*

§ 1100. **Lien on Real Estate.**—In some of the States, the decree for alimony is, or may be made, a lien on the real estate of the husband. Cases affirming, denying, and qualifying this right are cited in the note.<sup>10</sup>

<sup>1</sup> *Hugh v. Higgs*, 8 Wheat. 697. As to Massachusetts, see *Newcomb v. Newcomb*, 12 Gray, 28; *Chase v. Chase*, 105 Mass. 385; *Allen v. Allen*, 100 Mass. 373; *Slade v. Slade*, 106 Mass. 499; *Chase v. Ingalls*, 97 Mass. 524.

<sup>2</sup> *Van Buskirk v. Mulock*, 3 Harrison, 184, 193, 194.

<sup>3</sup> Ante, § 838.

<sup>4</sup> *De Blaquiére v. De Blaquiére*, 3 Hag. Ec. 322, 5 Eng. Ec. 126, 128; ante, § 961.

<sup>5</sup> Ante, § 829, 834.

<sup>6</sup> *De Blaquiére v. De Blaquiére*, 3 Hag. Ec. 322, 5 Eng. Ec. 126, and *Wilson v. Wilson*, cited in a note to the same case, 5 Eng. Ec. 129. And see *Gresse v. Gresse*, cited 1 Phillim. 210.

<sup>7</sup> 1 Bishop Mar. Women, § 230, 233–235.

<sup>8</sup> *Hewitt v. Hewitt*, 1 Bland, 101; *Allen v. Allen*, 100 Mass. 373.

<sup>9</sup> *Lyon v. Lyon*, 21 Conn. 185. And see *Bauman v. Bauman*, 18 Ark. 320, 68 Am. D. 171; *Newcomb v. Newcomb*, 12 Gray, 28.

<sup>10</sup> *Olin v. Hungerford*, 10 Ohio, 268; *Frakes v. Brown*, 2 Blackf. 295; *Hamlin v. Bevans*, 7 Ohio, 1st pt. 161; *Wightman v. Wightman*, 45 Ill. 167; *Tolerton v. Williard*, 30 Ohio St. 579; *Holmes v. Holmes*, 2 Stew. Ch. 9; *Blankenship v. Blankenship*, 19 Kan. 159; *Harshberger v. Harshberger*, 26 Iowa, 503; *Daniels v. Lindley*, 44 Iowa, 567; *Keyes v. Scanlan*, 63 Wis. 345; *Stoy v. Stoy*, 14 Stew. Ch. 370; *Yelton v. Handley*, 28 Ill. Ap. 640; *Brotherton v. Brotherton*, 14 Neb. 186; *Foster v. Foster*, 56 Vt. 540; *Swausen v.*

§ 1101. **Attachments, &c.** — In other States, there are processes of attachment and the like by which the husband's property can be otherwise held to pay alimony.<sup>1</sup> And —

§ 1102. **Compelling Security.** — In some and perhaps most of the States, the court can require the husband to give security for the payment of the alimony.<sup>2</sup> A bond for alimony is commonly not assignable,<sup>3</sup> or suable without permission in a court other than the one by which it was ordered.<sup>4</sup>

§ 1103. *Fraudulent Conveyances:* —

**Wife protected.** — The wife's claim to alimony is within the protection of statutes against fraudulent conveyances.<sup>5</sup>

§ 1104. **The Methods** — for enforcing the rights under this head vary with the facts, and only a citation of some of the authorities will be expedient here.<sup>6</sup> Of course, —

§ 1105. **Good when Made.** — A conveyance good when made cannot be set aside in the wife's favor for matter subsequent.<sup>7</sup>

§ 1106. *The Injunction:* —

**General.** — A court having equity powers,<sup>8</sup> or being expressly authorized by a statute, may employ the injunction in aid of the wife's alimony.<sup>9</sup> Thus, —

Swansen, 12 Neb. 210; Kurtz v. Kurtz, 38 Ark. 119; Sapp v. Wightman, 103 Ill. 150; Scott v. Rogers, 77 Iowa, 483.

<sup>1</sup> Guidery v. Guidery, 2 Mart. La. 132; Anonymous, 1 Hayw. 347; Spiller v. Spiller, 1 Hayw. 482; Feigley v. Feigley, 7 Md. 537, 61 Am. D. 375; Frakes v. Brown, 2 Blackf. 295; Farr v. Buckner, 32 Ind. 382; Daniels v. Lindley, 44 Iowa, 567; Ainsworth v. Ainsworth, 37 Ga. 627; Sewall v. Sewall, 139 Mass. 157; Sewall v. Sewall, 130 Mass. 201; Downs v. Flanders, 150 Mass. 92; Daniels v. Morris, 54 Iowa, 369.

<sup>2</sup> Prather v. Prather, 4 Des. 33; Harper v. Rooker, 52 Ill. 370; Reiffenstein v. Hooper, 36 U. C. Q. B. 295. See Rice v. Rice, 13 Ind. 562; Burnett v. Paine, 62 Me. 122; Gane v. Gane, 46 N. Y. Super. 218; Galusha v. Galusha, 108 N. Y. 114; Howarth v. Howarth, 11 P. D. 68.

<sup>3</sup> Reiffenstein v. Hooper, *supra*.

<sup>4</sup> Guenther v. Jacobs, 44 Wis. 354. Further of the bond, Dayton v. Drake, 64 Iowa, 714.

<sup>5</sup> Ante, § 905; Wetmore v. Wetmore, 5 Or. 469; Draper v. Draper, 68 Ill. 17;

Damon v. Damon, 28 Wis. 510; Odom v. Odom, 36 Ga. 286; Morrison v. Morrison, 49 N. H. 69; Janvrin v. Janvrin, 60 N. H. 169; Janvrin v. Curtis, 63 N. H. 312; Lott v. Kaiser, 61 Tex. 665; Tyler v. Tyler, 126 Ill. 525, 9 Am. St. 642; Green v. Adams, 59 Vt. 602, 59 Am. R. 761; Plunkett v. Plunkett, 114 Ind. 484. See Goodrich v. Goodrich, 44 Ala. 670.

<sup>6</sup> Foster v. Foster, 56 Vt. 540; Boog v. Boog, 78 Iowa, 524; Pickett v. Garrison, 76 Iowa, 347, 14 Am. St. 220; Springfield &c. Ins. Co. v. Peck, 102 Ill. 265; Atkins v. Atkins, 18 Neb. 474; Gregory v. Filbeck, 12 Colo. 379; Reeg v. Burnham, 55 Mich. 39; Way v. Way, 67 Wis. 662; Porter v. Wakefield, 146 Mass. 25.

<sup>7</sup> Metzler v. Metzler, 99 Ind. 384; Barrow v. Barrow, 108 Ind. 345; Halleman v. Halleman, 65 Ga. 476.

<sup>8</sup> Ante, § 462.

<sup>9</sup> Gardner v. Gardner, 87 N. Y. 14; Kirby v. Kirby, 1 Paige, 261, 262. **Settled on Wife.** — In line with this doctrine, where, in a case not of divorce, a husband had declared his intention to abandon his wife and carry off the pro-

§ 1107. **Restrain Husband from conveying.**—On a showing of danger,<sup>1</sup> the court will enjoin the husband not to convey away property, whereby he might defeat the wife of alimony, though no decree for it has yet been rendered.<sup>2</sup> But it has been deemed that this sort of injunction should not be made perpetual on a final decree; instead whereof, in Illinois, a mortgage on the husband's land should be required, the injunction to remain until it is given.<sup>3</sup>

§ 1108. **The Allegation**—on which the injunction issues must set out the facts which require it. Simply to state the wife's fears will not suffice, the ground for them must be shown.<sup>4</sup>

§ 1109. **Demurrable — Terms of Injunction.**—This injunction should not issue where the bill would be bad on demurrer. And it should not forbid the husband's use of the property for the necessary support of himself and children, or for working with his tools of trade, or carrying on his ordinary business.<sup>5</sup>

§ 1110. **Other Questions and Authorities.**—Some other questions of practice have been passed upon by the courts,<sup>6</sup> and there are other authorities to the general views above particularized,<sup>7</sup> but the foregoing elucidations are deemed to be practically sufficient.

§ 1111. *The Writ of Ne Exeat Regno*:—

**Superseded.**—This chancery writ, once considerably employed, is nearly everywhere practically superseded by modern statutes, which provide a more convenient remedy. Among other uses, —

ceeds of so much of her property as he could dispose of, the court by injunction compelled him to make a settlement of it to the use of himself and her. *Greenland v. Brown*, 1 Des. 196. But see *Parsons v. Parsons*, 9 N. H. 309, 32 Am. D. 362, as to the question under the restricted equity jurisdiction of the New Hampshire Court.

<sup>1</sup> *Johnson v. Johnson*, 59 Ga. 613.

<sup>2</sup> *Ricketts v. Ricketts*, 4 Gill, 105; *Frakes v. Brown*, 2 Blackf. 295; *Gray v. Gray*, 65 Ga. 193; *Wharton v. Wharton*, 57 Iowa, 696; *Springfield, &c. Ins. Co. v. Peck*, 102 Ill. 265; *Bergen v. Bergen*, 22 Ill. 187. And see *Vanzant v. Vanzant*, 23 Ill. 536; *Lamar v. Jennings*, 69 Ga. 392; *Remington v. San Francisco Superior Court*, 69 Cal. 633. Contra, *Newton v. Newton*, 11 P. D. 11.

<sup>3</sup> *Errissman v. Errissman*, 25 Ill. 136. See, as to New Hampshire, *Sheafe v. Sheafe*, 36 N. H. 155; *Sheafe v. Loughton*, 36 N. H. 240. And compare with *Tolerton v. Williard*, 30 Ohio St. 579.

<sup>4</sup> *Norris v. Norris*, 27 Ala. 519, 520. And see *Johnson v. Johnson*, 59 Ga. 613.

<sup>5</sup> *Rose v. Rose*, 11 Paige, 166.

<sup>6</sup> *Laurie v. Laurie*, 9 Paige, 234; *Kirby v. Kirby*, 1 Paige, 261; *Vincent v. Parker*, 7 Paige, 65; *Simmons v. Simmons*, 2 Rob. N. Y. 712.

<sup>7</sup> *Wilson v. Wilson*, 1 Des. 219; *Gilmore v. Gilmore*, 5 Jones Eq. 284; *Wilson v. Wilson*, *Wright*, 128; *Questel v. Questel*, *Wright*, 492; *Fishli v. Fishli*, 2 Litt. 337; *Goodrich v. Goodrich*, 44 Ala. 670.

§ 1112. In England,—it was resorted to in aid of alimony decreed by the ecclesiastical courts.<sup>1</sup> So that if after such decree the husband was about leaving the country to evade payment, the Court of Chancery would restrain him by this writ.<sup>2</sup> But it would not interfere to frustrate a mere domestic attempt to avoid paying the alimony.<sup>3</sup> There were various questions of practice settled by adjudication, but we need not further examine the subject as it stood under the older English law,<sup>4</sup> or inquire into the modern English methods.

§ 1113. With us,—the divorce jurisdiction is not in a separate court like the ecclesiastical, without the authority of arrest, but it is commonly in an equity one or in a common-law one with equity powers. Thereupon the writ of *ne exeat* has been employed when necessary, after the substance of the English law. So that when, with us, the suit is for alimony alone, or for divorce and alimony, and while it is pending the wife has reason to believe that her husband is about to leave the State to avoid paying what will be awarded her, she may have the writ of *ne exeat* against him, according to the equity practice.<sup>5</sup> Where the affidavit on which it was asked was filed before the bill for divorce, the Chancellor said that this was irregular; the “proper course” being “to file the bill or petition for divorce, and after that to file a petition for the *ne exeat*, supported by the necessary affidavit, sworn subsequently to the filing of the bill.”<sup>6</sup> In one case, while steps were in progress to enforce the payment of alimony already decreed, the wife was granted a *ne exeat* against the husband.<sup>7</sup> In many of the States, perhaps most, statutory methods have rendered this of the unwritten law superfluous.

<sup>1</sup> An exposition of it is given in Shelf. Mar. & Div. 600, 601; 2 Bishop Mar. & Div. § 505-507.

<sup>2</sup> Head v. Head, 3 Atk. 295; Vander-gucht v. De Blaquiére, 8 Sim. 315, 322; Pearne v. Lisle, Amb. 75; Smithson's Case, 2 Vent. 345; Shaftoe v. Shaftoe, 7 Ves. 171; Read v. Read, 1 Cas. Ch. 115, 2 Ch. R. 19; Ex parte Whitmore, 1 Dick. 143.

<sup>3</sup> Anonymous, 2 Atk. 210; Howden v. Rogers, 1 Ves. & B. 129.

<sup>4</sup> A reference to some of the cases may be convenient. Haffey v. Haffey, 14 Ves. 261; Cock v. Ravie, 6 Ves. 283; Dawson v. Dawson, 7 Ves. 173; Street v. Street,

Turn. & R. 322; Coglar v. Coglar, 1 Ves. Jr. 94; Anonymous, 2 Ves. Sen. 489; Oldham v. Oldham, 7 Ves. 410.

<sup>5</sup> Denton v. Denton, 1 Johns. Ch. 364; McGee v. McGee, 8 Ga. 295; Prather v. Prather, 4 Des. 33; Devall v. Devall, 4 Des. 79; Yule v. Yule, 2 Stock. 138; Kirby v. Kirby, 1 Paige, 261; Bayly v. Bayly, 2 Md. Ch. 326. And see Harper v. Rooker, 52 Ill. 370. For the later method in New York, see Boucicault v. Boucicault, 59 How. Pr. 131.

<sup>6</sup> Bylandt v. Bylandt, 2 Halst. Ch. 28.

<sup>7</sup> Lyon v. Lyon, 21 Conn. 185, 199, note.

§ 1114. *The Doctrine of this Chapter restated.*

The practice of the courts in awarding, securing, and enforcing the payment of alimony differs in our States as respects mere form, but in substance it is the same in all. The needful facts must be set out in pleadings, they must be proved, and due steps must accompany the rendition of the decree. The processes for enforcing it are not quite identical in our States, and commonly there is a considerable election among them. In most of the States there is the attachment for contempt. In some, there may be an execution. Quite widely a suit will lie on the decree regarded as a judgment; sometimes there may be *scire facias*; sometimes a bill in equity. There are various methods for securing payment to the wife, and preventing the husband from defrauding her. But further repetitions are not deemed necessary.

## CHAPTER XXXV.

## THE DIVISION OF THE PROPERTY ON MARRIAGE DISSOLUTION.

- § 1115. Introduction.  
 1116-1120. In General of Subject.  
 1121-1138. Particular Principles of Division.  
 1139. Doctrine of Chapter restated.

§ 1115. **How Chapter divided.** — We shall consider, I. In General of the Subject; II. Particular Principles of Division.

I. *In General of the Subject.*

§ 1116. **Elsewhere.** — The expositions of the several preceding chapters on alimony have brought largely to view the principles which regulate the maintenance of the wife after divorce. They will be helpful toward an understanding of the present subject.

§ 1117. **The Statutes** — authorizing this division are the sole foundation for it, the unwritten law knowing only of alimony. They are in varying terms, and as each must be interpreted as a part of one system of laws, and made to harmonize therewith,<sup>1</sup> the results even from the same words are not necessarily alike. But speaking generally, by legislation in some of our States, the court on decreeing a divorce from the bond of matrimony may, either in connection with a decree for alimony proper or without it, make partition between the parties of the property which in law had vested in the husband.<sup>2</sup> Now, —

<sup>1</sup> Ante, § 1039; 1040, 1050-1052; Bishop Written Laws, § 86, 123.

<sup>2</sup> Wetmore v. Wetmore, 5 Or. 469; Odom v. Odom, 36 Ga. 286; Blue v. Blue, 38 Ill. 9, 87 Am. D. 267; Daily v. Daily, 64 Ill. 329; Miller v. Miller, 33 Cal. 353; Craig v. Craig, 31 Tex. 203; Osborne v. Wainwright, 52 Cal. 312; Rees v. Rees, 7 Or. 47; Brooks v. Ankeny, 7 Or. 461;

Davis v. Davis, 68 N. C. 180; Eslinger v. Eslinger, 47 Cal. 62; Darrenberger v. Haupt, 10 Nev. 43; Gholston v. Gholston, 54 Ga. 285; O'Halloran v. O'Halloran, 49 Ga. 301; Jackson v. Jackson, 1 MacAr. 34; Wilke v. Wilke, 28 Wis. 296; Moul v. Moul, 30 Wis. 203; Bamford v. Bamford, 4 Or. 30; GrosLouis v. Northcut, 3 Or. 394; Whetstone v. Coffey, 48 Tex.



§ 1118. **Assimilated to Alimony.**—The rule of interpretation just stated makes it plain that this provision for the wife on divorce should be assimilated to the alimony of the unwritten law, except in particulars excluded by the statutory words, or their evident intent.<sup>1</sup> Indeed, —

§ 1119. **Called Alimony.**—It is within explanations in preceding chapters to say that alike in the statutes and the judicial opinions of some of our States, this setting off of property to the wife, or compelling of the husband to pay her a gross sum, is termed alimony.<sup>2</sup>

§ 1120. **Judicial Discretion.**—The foregoing views, expositions in previous chapters,<sup>3</sup> and the terms of most of the statutes combine to make it plain that, except as to particulars upon which the statute is imperative, the judgment for division is to be adjusted by the discretion of the court, and the discretion is judicial, itself governed by the reasons of the law and by precedent. So that here we come to the consideration of —

## II. *Particular Principles of Division.*

§ 1121. **Divesting Title.**—Some of the statutes in terms withhold from the court the power to divest the husband of his title to real estate.<sup>4</sup> This provision does not preclude an allotment of the use of his lands to the wife.<sup>5</sup> And where the statute

269; *Boggers v. Boggers*, 6 Baxter, 299; *Cole v. Cole*, 27 Wis. 531; *Donovan v. Donovan*, 20 Wis. 586; *Orr v. Orr*, 8 Bush, 156; *De Godey v. Godey*, 39 Cal. 157; *Gimmy v. Gimmy*, 22 Cal. 633; *Gimmy v. Doane*, 22 Cal. 635; *Wiggin v. Smith*, 54 N. H. 213; *Davis v. Davis*, 86 Ky. 32; *Owen v. Yale*, 75 Mich. 256; *Doscher v. Blackiston*, 7 Or. 403.

<sup>1</sup> Illustrative cases are *Blake v. Blake*, 68 Wis. 303; *Tyson v. Tyson*, 54 Md. 35; *Whitmore v. Hardin*, 3 Utah, 121; *Taylor v. Taylor*, 93 N. C. 418, 53 Am. R. 460; *Shaw v. Shaw*, 114 Ill. 586; *Ensler v. Ensler*, 72 Iowa, 159.

<sup>2</sup> *Broadwell v. Broadwell*, 21 Ohio St. 657; *Burrows v. Purple*, 107 Mass. 428; *McClung v. McClung*, 40 Mich. 493; *Taylor v. Gladwin*, 40 Mich. 232; *Blankenship v. Blankenship*, 19 Kan. 159; *Prescott v. Prescott*, 65 Me. 478; *Ross v. Ross*, 78 Ill. 402; *Armstrong v. Armstrong*, 35 Ill.

109; *Jolliff v. Jolliff*, 32 Ill. 527; *Prescott v. Prescott*, 59 Me. 146; *Boggers v. Boggers*, 6 Baxter, 299; *Chenault v. Chenault*, 5 Sneed, 248; *Dinet v. Eigenmann*, 80 Ill. 274; *Coad v. Coad*, 41 Wis. 23; *Blue v. Blue*, 38 Ill. 9, 87 Am. D. 267; *Daily v. Daily*, 64 Ill. 329; *Von Glahn v. Von Glahn*, 46 Ill. 134; *Williams v. Williams*, 36 Wis. 362; *Thomas v. Thomas*, 41 Wis. 229; *Gholston v. Gholston*, 31 Ga. 625; *Bacon v. Bacon*, 43 Wis. 197; *Petersine v. Thomas*, 28 Ohio St. 596; *Miller v. Clark*, 23 Ind. 370; *Gallagher v. Fleury*, 36 Ohio St. 590.

<sup>3</sup> Ante, § 936, 947, 966.

<sup>4</sup> *Fishli v. Fishli*, 2 Litt. 337.

<sup>5</sup> *Lovett v. Lovett*, 11 Ala. 763. And see further as to divesting title, *Brooks v. Ankeny*, 7 Or. 461; *Quisenberry v. Quisenberry*, 1 Duv. 197; *Bacon v. Bacon*, 43 Wis. 197; *Donovan v. Donovan*, 20 Wis. 586.

permits this divesting, the court in the ordinary case—for example, where neither the funds nor the exertions of the wife contributed to their acquisition—will, leaning toward the assimilating of the division to alimony,<sup>1</sup> decree to her the use only, not the fee.<sup>2</sup> There are other statutes which in one way or another operate to transfer the fee of the decreed lands to the wife.<sup>3</sup>

§ 1122. **In Specie or Money Equivalent.**—Not unfrequently lands are so situated as not to admit of a wise and just division *in specie*. The case is not unlike what often occurs in the ordinary partition of real estate, when, under the equity practice, or the direction of a statute, loss is avoided or any lack of equality is supplied by a sale and division of the proceeds, or by a money payment from the one party to the other.<sup>4</sup> And as all laws are to be interpreted into one system,<sup>5</sup> these division statutes ought to be, and they generally are, so administered as to accomplish a like equity. Thus, under the authority “to assign to any woman so separated such reasonable part of the estate of her late husband as,” &c. the Connecticut Court, in cases “where the situation of the estate would not literally admit of an assignment of a part,” has “uniformly decreed the payment of a sum of money.”<sup>6</sup> Various other courts have done the same, while on the other hand the right has been denied,—illustrated in cases where the husband had—

§ 1123. **Lands in Another State.**—A husband had lands in New York, but none in Connecticut. Thereupon the Connecticut tribunal made division by estimating their value and requiring him to pay the wife her proper proportion in money.<sup>7</sup> The like has been maintained in Indiana<sup>8</sup> and Tennessee,<sup>9</sup>—the court

<sup>1</sup> Ante, § 1118.

<sup>2</sup> Shaw v. Shaw, 114 Ill. 586; Rogers v. Vines, 6 Ire. 293.

<sup>3</sup> Gallagher v. Fleury, 36 Ohio St. 590; McClung v. McClung, 42 Mich. 53; Swett v. Swett, 49 N. H. 264; Whittier v. Whittier, 11 Fost. N. H. 452; Barrett v. Failing, 6 Saw. 473; Weiss v. Bethel, 8 Or. 522; Houston v. Timmerman, 17 Or. 499; Simpson v. Simpson, 80 Cal. 237.

<sup>4</sup> 1 Story Eq. § 654, 657; Thompson v. Hardman, 6 Johns. Ch. 436; Harwood v. Kirby, 1 Paige, 469; Holmes v. Holmes, 2 Jones Eq. 334; Windley v. Barrow, 2 Jones Eq. 66; Royston v. Royston, 13 Ga.

425; Coleman v. Lane, 26 Ga. 515; Ross v. Ramsey, 3 Head, 15.

<sup>5</sup> Ante, § 1117.

<sup>6</sup> Sanford v. Sanford, 5 Day, 353, 356, 357; Lyon v. Lyon, 21 Conn. 185, 198. See Beopple v. Green, 33 La. An. 1191; Moore v. Moore, 59 Tex. 54; Cummings v. Cummings, 75 Cal. 434.

<sup>7</sup> The Connecticut cases just cited.

<sup>8</sup> Fischli v. Fischli, 1 Blackf. 360, 12 Am. D. 251; McKinney v. McKinney, cited 1 Blackf. 363. For later Indiana decisions, see Rice v. Rice, 6 Ind. 100; Green v. Green, 7 Ind. 113.

<sup>9</sup> Richardson v. Wilson, 8 Yerg. 67;

in the latter State declining to take into the account the husband's future earnings.<sup>1</sup> But in Kentucky the power to make division otherwise than *in specie* was denied, consequently it was held that lands in another State could not be taken into the account.<sup>2</sup>

§ 1124. **Order for Maintenance — Lands** — Under the provision that on decreeing a divorce "the court may make such order in relation to the children and property of the parties, and the maintenance of the wife, as shall be right and proper," it was held that lands of the guilty husband could be set off to the innocent wife in fee.<sup>3</sup>

§ 1125. **Homestead.** — Some questions have arisen on assigning to the wife the homestead, and on her rights therein; but they are under varying statutes, and a simple reference to cases will suffice.<sup>4</sup>

§ 1126. **Settlement — (Varying).** — Marriage settlements are not so much in use in our States as in England. And we have probably no decisions as to how they can be dealt with, or whether at all, under our statutes for the division of the property. We shall see in a future chapter what is the effect upon them of the divorce itself, terminating the marriage. In England, the original Divorce Act authorized the court, on dissolving a marriage for the wife's adultery, to order a settlement of her "property or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them."<sup>5</sup> Later it was added that "after a final decree of nullity of marriage or dissolution," the court "may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents" as it deems fit.<sup>6</sup> Not to

*Boggers v. Boggers*, 6 Baxter, 299. But see *D'Arusmont v. D'Arusmont*, 14 Law Reporter, 311, 8 West. Law Jour. 548.

<sup>1</sup> *Boggers v. Boggers*, 6 Baxter, 299.

<sup>2</sup> *Fishli v. Fishli*, 2 Litt. 337. See *Wilmore v. Wilmore*, 15 B. Monr. 49. And see further as to this, ante, § 841.

<sup>3</sup> *Jolly v. Jolly*, 1 Iowa, 9. As to New Hampshire, see *Whittier v. Whittier*, 11 Fost. N. H. 452.

<sup>4</sup> *Sellon v. Reed*, 5 Bis. 125; *Brandon v. Brandon*, 14 Kan. 342; *Gimmy v. Doane*, 22 Cal. 635; *Cole v. Cole*, 23 Iowa, 433;

*Tiemann v. Tiemann*, 34 Tex. 522; *Shoemaker v. Chalfant*, 47 Cal. 432; *Vanzant v. Vanzant*, 23 Ill. 536; *Jolliff v. Jolliff*, 32 Ill. 527; *Craig v. Craig*, 31 Tex. 203; *Dunham v. Dunham*, 128 Mass. 34; *Webster v. Webster*, 64 Wis. 438.

<sup>5</sup> 20 & 21 Vict. c. 85, § 45, supplemented by 23 & 24 Vict. c. 144, § 6. See as to this, *Bacon v. Bacon*, 2 Swab. & T. 86; *Carstairs v. Carstairs*, 3 Swab. & T. 538; *Norris v. Norris*, 1 Swab. & T. 174, and cases in subsequent notes.

<sup>6</sup> 22 & 23 Vict. c. 61, § 5. This being

enter much into expositions of these provisions, some of the cases are referred to in a note.<sup>1</sup> Following the rule of construing laws together,<sup>2</sup> the court looks upon these two statutes as one, so never takes from the innocent husband 'any benefit which is his under a settlement.'<sup>3</sup> And in proper circumstances it allots to him so much of the wife's settled property as will leave him substantially in the same pecuniary condition as though the marriage and cohabitation continued. "It would be of evil example," said Lord Penzance, "if this court were to decide that the entire fortune of a wealthy married woman was to be reckoned as part of the prospects of an adulterer, or the resources of a second home for a guilty woman."<sup>4</sup> A leading principle is to protect the innocent party from a loss of means by reason of the dereliction and divorce.<sup>5</sup> Still, —

§ 1127. **Guilty Wife.** — Contrary to one of these rules, and contrary to a rule of the unwritten law for alimony,<sup>6</sup> some of our courts almost as of course give the wife something, though she was the delinquent. Her proportion will not be as great as when the fault is on the side of the husband.<sup>7</sup> The expositions

held to apply only where there are living children, the oversight or error of interpretation was corrected by 41 Vict. c. 19, § 3. *Yglesias v. Yglesias*, 4 P. D. 71.

<sup>1</sup> *Bell v. Bell*, 1 Swab. & T. 565; *Boyn-ton v. Boynton*, 2 Swab. & T. 275; *Bent v. Bent*, 2 Swab. & T. 392; *Thomas v. Thomas*, 2 Swab. & T. 89; *Webster v. Webster*, 3 Swab. & T. 106; *Callwell v. Callwell*, 3 Swab. & T. 259; *Gill v. Gill*, 3 Swab. & T. 359; *Stone v. Stone*, 3 Swab. & T. 372; *Ling v. Ling*, 4 Swab. & T. 99; *Rawlins v. Rawlins*, 4 Swab. & T. 158; *Chetwynd v. Chetwynd*, Law Rep. 1 P. & M. 39; *Bird v. Bird*, Law Rep. 1 P. & M. 231; *Corrance v. Corrance*, Law Rep. 1 P. & M. 495; *Smithe v. Smithe*, Law Rep. 1 P. & M. 587; *Worsley v. Worsley*, Law Rep. 1 P. & M. 648; *Graham v. Graham*, Law Rep. 1 P. & M. 711; *Sykes v. Sykes*, Law Rep. 2 P. & M. 163; *Crisp v. Crisp*, Law Rep. 2 P. & M. 426; *Hope v. Hope*, Law Rep. 3 P. & M. 226; *Gladstone v. Gladstone*, 1 P. D. 442; *Ross v. Ross*, 7 P. D. 20; *Wigney v. Wigney*, 7 P. D. 177, 228; *Jump v. Jump*, 8 P. D. 159; *Ponsonby v. Ponsonby*, 9 P. D. 58, 122; *Oppenheim v. Oppenheim*, 9 P. D. 60; *Clifford v. Clifford*, 9 P. D. 76; *A. v. M.*

10 P. D. 178; *Noel v. Noel*, 10 P. D. 179; *Farrington v. Farrington*, 11 P. D. 84; *Smith v. Smith*, 12 P. D. 102; *Bosville v. Bosville*, 13 P. D. 76; *Benyon v. Benyon*, 15 P. D. 29, 54; *Swift v. Swift*, 15 P. D. 118; *Nunneley v. Nunneley*, 15 P. D. 186.

<sup>2</sup> Ante, § 1117.

<sup>3</sup> *Thompson v. Thompson*, 2 Swab. & T. 649, 651.

<sup>4</sup> *March v. March*, Law Rep. 1 P. & M. 440, 443. And see *Paul v. Paul*, Law Rep. 2 P. & M. 93; *Milne v. Milne*, Law Rep. 2 P. & M. 295, where the court stated the usual order in such cases to be "that the trustees of the settlements shall pay and apply the income and proceeds of the property settled on the wife as if she were dead" p. 299; s. p. *Bullock v. Bullock*, Law Rep. 2 P. & M. 389; *Pratt v. Jenner*, Law Rep. 1 Ch. 493.

<sup>5</sup> *Maudslay v. Maudslay*, 2 P. D. 256; *Benyon v. Benyon*, 1 P. D. 447, 451.

<sup>6</sup> Ante, § 861-868.

<sup>7</sup> *Lovett v. Lovett*, 11 Ala. 763, 769, 770. And see *Eslinger v. Eslinger*, 47 Cal. 62; *McCafferty v. McCafferty*, 8 Blackf. 218; *Richardson v. Wilson*, 8 Yerg. 67; *Sheafe v. Sheafe*, 4 Fost. N. H. 564.

of a preceding chapter show how this sort of question ought to be regarded.<sup>1</sup> In reason, —

§ 1128. **The Proportions**, — where the divorce dissolves a valid marriage, should, so far as the judicial discretion can be subjected to rule,<sup>2</sup> vary with the merits and demerits of the wife<sup>3</sup> and husband respectively, the needs and capabilities of each,<sup>4</sup> the sources of the property, whether or not alimony is given in addition to this division, the nature and magnitude of the delinquency, and especially which of the parties is the delinquent. In addition whereto we have various considerations; thus, —

§ 1129. **As though Marriage Void**. — It appears to be the doctrine of some of the cases<sup>5</sup> that the common-law rule in nullity of marriage, by which the parties respectively receive back what went into the common fund, should govern this division; namely, that they should be placed as nearly as may be in the pecuniary positions they occupied before marriage.<sup>6</sup> But this rule, applied to this divorce, is contrary to the reasonings of the law;<sup>7</sup> for it puts innocence and guilt on one level, gives no damage for wrong inflicted, and affords no restraint against breaches of matrimonial duty. And to send away an injured wife with simply what she brought to her husband, or with it and a further sum merely in compensation for her services rendered since the marriage, — with nothing for her mental sufferings, nothing for her blasted prospects in life, nothing for the sacrifice of her virginity and early bloom to brutality or lust, — could hardly be deemed ordinary, much less judicial justice. Indeed, the Kentucky Court expressly decided against this rule;<sup>8</sup> and it seems not probable that in the State where it originated it would be applied in circumstances rendering it thus palpably unjust.<sup>9</sup> Even —

§ 1130. **In the Nullity Suit** — this rule has been qualified where the statute permitted. It was provided in Iowa that when either party enters into the “marriage in good faith, supposing the other to be capable of contracting,” the nullity sentence shall

<sup>1</sup> Ante, § 861–868.

<sup>2</sup> Ante, § 996, 1006, 1120.

<sup>3</sup> *Tumbleson v. Tumbleson*, 79 Ind. 558; *Varney v. Varney*, 58 Wis. 19; *Ensler v. Ensler*, 72 Iowa, 159; *Snodgrass v. Snodgrass*, 40 Kan. 494.

<sup>4</sup> *Webster v. Webster*, 64 Wis. 438.

<sup>5</sup> Compare with ante, § 1006 et seq.

<sup>6</sup> *McGill v. McGill*, 19 Fla. 341; *Chunn*

*v. Chunn*, Meigs, 131; *Payne v. Payne*, 4 Humph. 500, 40 Am. D. 660.

<sup>7</sup> Vol. I. § 130; *Bishop Non-Con. Law*, § 839, note, 976, note.

<sup>8</sup> *Wilmore v. Wilmore*, 15 B. Monr. 49.

<sup>9</sup> As, see *Robinson v. Robinson*, 7 Humph. 440. But see *Simons v. Simons*, 23 Tex. 344; *Wright v. Wright*, 7 Tex. 526.

so state, whereupon "the court may decree such innocent party compensation as in cases of divorce." And where unknown to the woman the man was insane, and she lost her health through deprivations in living with and taking care of him, she was given thirty-five hundred dollars out of an estate worth at the time of the marriage fifteen thousand dollars.<sup>1</sup>

§ 1131. **Not more than All.** — A division of the husband's estate setting off to the wife more than the whole of it, is impossible. Or if there is nothing for her, she can have nothing. "It is her misfortune to which she must submit."<sup>2</sup>

§ 1132. **As though Husband dead — Property from Wife.** — A suggestion helpful in some circumstances has been to give the woman, whose marriage is dissolved for the husband's fault, not less of his estate than she would be entitled to if he were dead. But this rule is nowhere absolute.<sup>3</sup> Perhaps ordinarily the innocent wife should receive neither less than she brought to her husband, nor less than she would be entitled to if he were dead; leaving the way open for less or more when required on a careful application, to the particular facts, of such doctrines as were considered in our chapters on alimony.<sup>4</sup> "The subject is perhaps not susceptible of any general rule, and it is pretty certain that the legislature did not intend that it should be subject to any, or they would have provided the rule, and not left the matter to the discretion of the court."<sup>5</sup>

§ 1133. **Resulting in How Much.** — It was once observed: "This case is one in which we think the court ought to decree as great a proportion to the wife as any which could occur would authorize. The parties are without children, and the wrong done by the defendant, by deserting the complainant, is groundless and without pretext. We think she ought to be decreed the use for life of one third of his real estate, and a moiety of his personal estate."<sup>6</sup>

§ 1134. **Divorce wrongly decreed.** — A Kentucky case had the singular element that the court below gave the husband a divorce

<sup>1</sup> Barber v. Barber, 74 Iowa, 301, 303.

<sup>2</sup> Chenault v. Chenault, 5 Sneed, 248, 256. See Howe v. Howe, 4 Nev. 469.

<sup>3</sup> Thornberry v. Thornberry, 4 Litt. 251; Jeans v. Jeans, 2 Harring. Del. 142.

<sup>4</sup> See also Holmes v. Holmes, Walk. Missis. 474, 476; Dejarnet v. Dejarnet, 5 Dana, 499; Tewksbury v. Tewksbury, 4

How. Missis. 109; Kingsberry v. Kingsberry, 3 Harring. Del. 8; Maguire v. Maguire, 7 Dana, 181; Sanford v. Sanford, 5 Day, 353.

<sup>5</sup> Fishli v. Fishli, 2 Litt. 337, 343. See also Rudman v. Rudman, 5 Ind. 63; Wright v. Wright, 7 Tex. 526.

<sup>6</sup> Fishli v. Fishli, 2 Litt. 337, 343.

to which he was not entitled, but the Court of Appeals had no jurisdiction to disturb it.<sup>1</sup> The other facts were that the wife was in every way estimable; that she had been fraudulently removed from the home of her husband, who evidently was desirous to get rid of her; that the estate she brought him on the marriage, he being a widower with several children, and she a maiden lady, was of the value of about one thousand dollars; and that his estate, consisting chiefly of land and slaves, was worth from twelve to fifteen thousand dollars. The Court of Appeals restored to her the property she originally possessed, and gave her seven hundred and fifty dollars besides.<sup>2</sup>

§ 1135. **Prior Voluntary Separation.** — Parties separated by mutual consent, the wife receiving back what she brought to the marriage, being about one sixth of all the property. Afterward the husband sued for a divorce, and on a question of *pendente lite* alimony and suit-money the court confirmed to her what she had thus reacquired, and gave suit-money, but nothing further for temporary alimony. Said Lumpkin, J.: "When the separation by agreement took place, the wife was content to take back the property she brought into the marriage. She deemed this enough for her maintenance, and we leave her to abide by it. . . . But she did not, perhaps, anticipate a suit for a divorce; and this is an additional expense that she has been forced to incur by the husband."<sup>3</sup>

§ 1136. **The Claims of Creditors** — should be respected,<sup>4</sup> as in alimony, already considered.<sup>5</sup>

§ 1137. **Practice** — (**When Wife's Rights attach**). — On land being assigned to the wife, she is in Delaware entitled to the rents from the confirmation of the commissioner's return.<sup>6</sup> In New Hampshire, "the court may restore to the wife all or any part of her lands, &c., and may assign to her such part of the real or personal estate of her husband, or order him to pay such sum

<sup>1</sup> Another like case was *Ensler v. Ensler*, 72 Iowa, 159. And see *Thornberry v. Thornberry*, 4 Litt. 251; *Maguire v. Maguire*, 7 Dana, 181; *Boggess v. Boggess*, 4 Dana, 307.

<sup>2</sup> *Pence v. Pence*, 6 B. Monr. 496. See, as further illustrating the topics of the foregoing sections, *Fitts v. Fitts*, 14 Tex. 443; *Trimble v. Trimble*, 15 Tex. 18; *Jackson v. Stewart*, 20 Ga. 120; *Rourke*

*v. Rourke*, 8 Ind. 427; *Sharp v. Sharp*, 2 Sneed, 496; *Houston v. Houston*, 4 Ind. 139, 141; *Wilmore v. Wilmore*, 15 B. Monr. 49; *Kashaw v. Kashaw*, 3 Cal. 312; *Hagerty v. Harwell*, 16 Tex. 663.

<sup>3</sup> *Killiam v. Killiam*, 25 Ga. 186, 188. And see *Benyon v. Benyon*, 1 P. D. 447.

<sup>4</sup> *Jackson v. Stewart*, 20 Ga. 120.

<sup>5</sup> Ante, § 905, 1103-1105.

<sup>6</sup> *Spicer v. Spicer*, 5 Harring. Del. 106.

of money, as may be deemed just and expedient." And by construction the assignment vests the title in her, the same as bankruptcy does in the assignee. She may sue in her own name.<sup>1</sup> No confirmation of title by the husband is necessary.<sup>2</sup>

§ 1138. **Something further**, — not important to be here particularized, may be found in cases cited to the note.<sup>3</sup>

§ 1139. *The Doctrine of this Chapter restated.*

The division of the property by judicial decree on a dissolution of the marriage is altogether of statutory regulation. It is unknown to the unwritten law. It may be accompanied by alimony, or by a restoration to the wife of what was hers before marriage, or by neither, or both. When it stands alone, the wife will have a larger proportion than when she has also alimony and restoration. But in other respects this circumstance appears not to be material. Contrary to the rule in common-law alimony, a wife whose ill-conduct has caused the divorce may in special circumstances have something under these division statutes, but she will stand before the court with no claim comparable to that of an innocent and wronged wife. The whole question is under the judicial discretion, which, in the nature of this sort of case, while regulated by rule, cannot be so with much exactness. Practically, therefore, the views of the individual judge will have considerable influence upon each particular result.

<sup>1</sup> Whittier v. Whittier, 11 Fost. N. H. 452.

<sup>2</sup> Swett v. Swett, 49 N. H. 264. And see Barker v. Cobb, 36 N. H. 344.

<sup>3</sup> Sheafe v. Sheafe, 40 N. H. 516; Logan v. Logan, 2 B. Monr. 142; Stewartson v. Stewartson, 15 Ill. 145; Bergen v. Ber-

gen, 22 Ill. 187; Chapman v. Chapman, 13 Ind. 396; Jeans v. Jeans, 2 Harring. Del. 142; Elmore v. Elmore, 10 Cal. 224; Rourke v. Rourke, 8 Ind. 427; Snodgrass v. Snodgrass, 40 Kan. 494; Phillips v. Phillips, 13 P. D. 220.



## CHAPTER XXXVI.

## THE RESTORATION TO THE WIFE OF HER PROPERTY.

§ 1140. **The last Chapter and this** — are closely related. So the elucidations of each will assist in the understanding of the other.

§ 1141. **The Statutes** — on this subject prevail in only a part of our States. They are in terms diverse, but their effect is to authorize the court pronouncing a divorce on prayer of the wife, to revest in her the property which came to the husband by the marriage.<sup>1</sup>

§ 1142. **Without Statutory Help**, — a court of equity can compel a divorced husband to convey to his late wife lands which are equitably hers, the title whereto he had by undue means caused to be made to himself. And this is so even though the divorce was in another State.<sup>2</sup>

§ 1143. **Intervening Claims**. — After a husband has sold chattels of the wife which by law vested in him,<sup>3</sup> or his creditor has attached them,<sup>4</sup> there is in the court no power to restore them to her, as against the purchaser or creditor.<sup>5</sup>

§ 1144. **Husband's Waste on Wife's Lands**. — In a wife's divorce suit in Delaware, it was proposed to inquire into waste by the husband on her lands before and since the filing of the bill. He objected on the ground that her real estate was by the statute to be simply restored; and, counsel said, all further allowance was to be in personal property. The court received evidence of the waste committed after the suit began, not before, observing:

<sup>1</sup> See *Flood v. Flood*, 5 Bush, 167. As to Maryland, see *Tayman v. Tayman*, 2 Md. Ch. 393. As to England, *A. v. M.* 10 P. D. 178; *Wood v. Wood*, 14 P. D. 157.

<sup>2</sup> *Golding v. Golding*, 82 Ky. 51. And see *Snodgrass v. Snodgrass*, 40 Kan. 494.

<sup>3</sup> *Warner v. Warner*, 33 Missis. 547.

<sup>4</sup> *Jennings v. Montague*, 2 Grat. 350.

<sup>5</sup> For further points, see *Sharp v. Sharp*, 2 Sneed, 496; *Whittier v. Whittier*, 11 Fost. N. H. 452. And see post, § 1145.

"The husband would be entitled to all the proper issues from the wife's land during the marriage; but if he has, since the filing of the petition, wantonly wasted the inheritance, the court cannot restore to her all her lands, and make a 'reasonable allowance out of the husband's real and personal estate,' without inquiring into and compensating her for this destruction."<sup>1</sup> But is waste by the husband a "proper issue from the wife's land"?<sup>2</sup> In another aspect, this decision appears to be an oversight;<sup>3</sup> for in awarding alimony, courts look into the mutual conduct of the parties and the sources of the husband's estate or income;<sup>4</sup> so that an augmentation of his means by depredations on the wife's lands, as well before as after suit, would be material.

§ 1145. **Restoring Land after Sale by Husband.** — By a statute, on a divorce from bed and board, which by the common law leaves the husband in full possession of the wife's real estate, it was directed that she, "if there be no issue living at the time of the divorce, shall be restored to all her lands." Next, a decree in favor of a complaining wife ordered a restoration in the words of the statute. Thereon she was adjudged entitled to immediate possession even of lands which he had conveyed away; the statute operating as a change, to this extent, of the law which gave the husband a life-estate in the wife's realty.<sup>5</sup> As to —

§ 1146. **Personalty Consumed.** — We have seen what is the effect of a husband's sale of personal property which was the wife's.<sup>6</sup> This Massachusetts statute did not extend to such property, to restore which the courts had no authority until it was given them by Stat. 1828, c. 55.<sup>7</sup> But inadvertently it had in some cases been done. In one, the decree, on a divorce from bed and board, was "that all the real and personal property which came to the defendant by his marriage with the plaintiff should be restored to her." So she sued him "for certain articles," says the report, "which were her property" when the marriage was celebrated, "of which a part had been consumed in the family of the plaintiff and the defendant, and the residue sold

<sup>1</sup> Grubb v. Grubb, 1 Harring. Del. 516. On the general question of waste by the husband, of the wife's lands, see 1 Bishop Mar. Women, § 518-526, 570, 571.

<sup>2</sup> 1 Ib. § 570.

<sup>3</sup> Ante, § 28, 922, and places referred to.

<sup>4</sup> Ante, § 1006, 1018.

<sup>5</sup> Kriger v. Day, 2 Pick. 316. Compare this with ante, § 1143.

<sup>6</sup> Ante, § 1143.

<sup>7</sup> Dean v. Richmond, 5 Pick. 461; Page v. Estes, 19 Pick. 269.

before the divorce." The court, not advertng to the fact that even the decree itself was unauthorized as to the personal property, said it "could not operate on the articles consumed or disposed of as above, and entered a non-suit."<sup>1</sup>

§ 1147. **Husband's Profits from Wife's Lands.** — We shall see in the proper place that a dissolution of the marriage by divorce, the same as by the husband's death, entitles the wife at common law to the immediate possession of her lands, without the aid of a judicial decree. Thereupon, a wife's lands being in charge of a receiver, she brought a dissolution bill against her husband for his adultery. And Chancellor Walworth ordered the receiver to pay into court, to abide the result of the divorce suit, the moneys accruing. "If he has been guilty of adultery," said this learned person, "he has forfeited his right to the rents and profits of her estate, by this violation of the marriage contract. And if she succeeds in obtaining a decree for a divorce, she will be entitled as a matter of course to her real estate; and to the rents and profits thereof from the time of filing the bill, so far as he has not actually reduced the same to his possession."<sup>2</sup>

§ 1148. *The Doctrine of this Chapter restated.*

A statutory restoration of the wife's property, or a judicial decree for it authorized by a statute, cannot extend to what has been lawfully consumed, or lawfully sold and vested in a third person. But it may cover what remains in the husband. This is the entire doctrine, various applications whereof are stated in this chapter. A statute of this sort does not take away any right of the wife under the unwritten law, — the written and unwritten rule operating together.

<sup>1</sup> Dean v. Dean, 5 Pick. 428.

<sup>2</sup> Vincent v. Parker, 7 Paige, 65, 66.  
Compare with ante, § 1144. See, as to

the Kentucky law on the subject of this chapter, Williams v. Gooch, 3 Met. Ky. 486.

## CHAPTER XXXVII.

## THE CUSTODY AND SUPPORT OF CHILDREN.

- § 1149, 1150. Introduction.
- 1151-1159. Preliminary Doctrine.
- 1160-1178. Custody independently of Divorce.
- 1179-1184. During Divorce Suit.
- 1185-1209. After Divorce rendered.
- 1210-1223. Maintenance after Divorce.
- 1224. Doctrine of Chapter restated.

§ 1149. **This Chapter**, — while nominally travelling a little outside of the sphere of the divorce suit, is intended not to go beyond what will be helpful therein. For the general doctrines, applicable in other forms of the controversy concerning the custody and support of children, are essential to a proper understanding of the law and practice connected with divorce.

§ 1150. **How Chapter divided**. — We shall consider, I. The Preliminary Doctrine; II. The Custody independently of Divorce and Divorce Proceedings; III. The Custody during the Divorce Suit; IV. The Custody on and after the Divorce; V. The Maintenance of the Children after Divorce.

I. *The Preliminary Doctrine.*

§ 1151. **Doctrine defined**. — Contrary in part to views prevailing in former ages, a child is in our modern law regarded as from birth<sup>1</sup> entirely a human being, given, by the severance of the cord which connected it to its mother, all the rights pertaining to man. Its independent circulation is not physical only, but legal as well. The law casts upon its parents and the community duties toward it during its immature years, therefore<sup>2</sup> confers the power and rights necessary to their discharge. But these are deemed only the surroundings of the child, permitted

<sup>1</sup> 2 Bishop Crim. Law, § 630-634.

<sup>2</sup> Ante, § 116 and note.

or required for its good, which is the overshadowing central object. Let us look at some of the particulars; thus, —

§ 1152. **Father's Guardianship.** — To an extent not necessary to be here defined, the father is at the common law the guardian of his minor children.<sup>1</sup> And plainly his rights to their custody cannot be less than the exigencies of the guardianship require.

§ 1153. **Mother's — (Second Husband).** — If the husband dies, the guardianship devolves, not to its full extent, on the mother.<sup>2</sup> On her marrying again, the second husband will not, *jure mariti*, take any part of it, or be compellable to support her children by the former marriage, or entitled to their services or society.<sup>3</sup> And still this limited guardianship remains in her,<sup>4</sup> though it seems to be in some degree and as respects custody impaired.<sup>5</sup>

§ 1154. **Father to support Children — (Earnings).** — The father likewise is under an obligation, not only moral, but recognized also by the law, to provide sustenance for his minor children. While he does, he is entitled to their earnings, but no longer.<sup>6</sup>

<sup>1</sup> Macpherson on Infants, 52-62; Miles v. Boyden, 3 Pick. 213; Kenningham v. McLaughlin, 3 T. B. Monr. 30; Forsyth v. Kreakbaum, 7 T. B. Monr. 93; Isaacs v. Boyd, 5 Port. 388; Wilson v. Wright, Dudley, Ga. 102; Griffing v. Hopkins, Walk. Missis. 49; Jackson v. Combs, 7 Cow. 36; Magee v. Holland, 3 Dutcher, 86, 72 Am. D. 341.

<sup>2</sup> Macpherson on Infants, 60, 65; Eyre v. Shaftsbury, 2 P. Wms. 102, 116; Roach v. Garvan, 1 Ves. Sen. 157, 158; Mendes v. Mendes, 3 Atk. 619, 624, 1 Ves. Sen. 89; Dedham v. Natick, 16 Mass. 135, 140; Whipple v. Dow, 2 Mass. 415; Heyward v. Cuthbert, 4 Des. 445; Tilton v. Russell, 11 Ala. 497; Jones v. Tevis, 4 Litt. 25, 14 Am. D. 98; Osborn v. Allen, 2 Dutcher, 388; Curtis v. Curtis, 5 Gray, 535.

<sup>3</sup> Tubb v. Harrison, 4 T. R. 118; Worcester v. Marchant, 14 Pick. 510; C. v. Hamilton, 6 Mass. 273; Williams v. Hutchinson, 5 Barb. 122, 3 Comst. 312, 53 Am. D. 301; Brush v. Blanchard, 18 Ill. 46; Mowbray v. Mowbray, 64 Ill. 383. See Gorman v. S. 42 Tex. 221.

<sup>4</sup> Villareal v. Mellish, 2 Swanst. 533; Mellish v. De Costa, 2 Atk. 14; Armstrong v. Stone, 9 Grat. 102; S. v. Scott, 10 Fost. N. H. 274.

<sup>5</sup> S. v. Scott, 10 Fost. N. H. 274.

<sup>6</sup> Benson v. Remington, 2 Mass. 113; Nightingale v. Withington, 15 Mass. 272, 275, 8 Am. D. 101; Bishop v. Shepherd, 23 Pick. 492; Wodell v. Coggeshall, 2 Met. 89, 35 Am. D. 391; Shute v. Dorr, 5 Wend. 204; Morse v. Welton, 6 Conn. 547; Chase v. Smith, 5 Vt. 556; Emery v. Gowen, 4 Greenl. 33, 16 Am. D. 233; The Etna, 1 Ware, 462; Lord v. Poor, 23 Me. 569; Steele v. Thatcher, 1 Ware, 91; Stone v. Pulsipher, 16 Vt. 428; Godfrey v. Hays, 6 Ala. 501, 41 Am. D. 58; White v. Henry, 24 Me. 531; Bell v. Hallenbeck, Wright, 751; Ford v. Monroe, 20 Wend. 210; Hoover v. Heim, 7 Watts, 62; Wilt v. Vickers, 8 Watts, 227; Jenison v. Graves, 2 Blackf. 441; Kennard v. Burton, 25 Me. 39, 43 Am. D. 249; Canovar v. Cooper, 3 Barb. 115; Plummer v. Webb, 1 Ware, 69, 75; Stovall v. Johnson, 1 U. S. Mo. Law Mag. 528; Tompkins v. Tompkins, 3 C. E. Green, 303; Tanner v. Skinner, 11 Bush, 120; Hollingsworth v. Swedenborg, 49 Ind. 378, 19 Am. R. 687; Holtzman v. Castleman, 2 MacAr. 555; Bennefield v. S. 80 Ga. 107; Gilley v. Gilley, 79 Me. 292; Tetherow v. St. Joseph & Co. Rld. 98 Mo. 74, 14 Am. St. 617, 623; Beardsley v. Hotchkiss, 96 N. Y. 201; Trimble v. Dudds, 2 Tenn. Ch. 500.

§ 1155. **How Compelled — (Statutes).** — In England and generally in our States, there are statutory processes, commonly under the control of the overseers of the poor, for compelling parents to provide for their children.<sup>1</sup> As to —

§ 1156. **Credit on Father's Account.** — By opinions widely prevailing in our States, if the father does not voluntarily render to his child needful maintenance, any third person requested by the child may supply it, and collect payment from him the same as where one furnishes to a neglected wife necessities.<sup>2</sup> On the other hand, this form of the liability is denied in other of our States and in England.<sup>3</sup> It is believed that the question does not admit of a juridical reasoning so conclusive as to require a court on either side to overturn a line of prior decisions, — *stare decisis* being applicable here. Certainly the cases of the infant and the wife are not alike. An infant, for example, can charge himself for necessities,<sup>4</sup> but under the common

<sup>1</sup> 2 Kent Com. 190; *Kelley v. Davis*, 49 N. H. 187; *St. Andrew's Undershaft v. Mendez de Breta*, 1 Ld. Raym. 699; *Bevan v. McMahon*, 2 Swab. & T. 58; *Mills v. Wyman*, 3 Pick. 207, 212; *Loomis v. Newhall*, 15 Pick. 159; *Cook v. Bradley*, 7 Conn. 57, 18 Am. D. 79; *Stone v. Stone*, 32 Conn. 142; *East Greenwich v. Card*, 1 R. I. 409. And see *Smith v. Lapeer*, 34 Mich. 58.

<sup>2</sup> 2 Kent Com. 191-193; *Van Valkenburgh v. Watson*, 13 Johns. 480, 7 Am. D. 395; *Stanton v. Willson*, 3 Day, 37, 3 Am. D. 255; *Hillsborough v. Deering*, 4 N. H. 86, 95; *Pidgin v. Cram*, 8 N. H. 350; *Owen v. White*, 5 Port. 435, 30 Am. D. 572; *Tomkins v. Tomkins*, 3 Stock. 512. And see *Addison v. Bowie*, 2 Bland, 606; *Newport v. Cook*, 2 Ashm. 332; *Dupont v. Johnson*, 1 Bailey, Ch. 274; *Myers v. Myers*, 2 McCord Ch. 214, 264, 16 Am. D. 648; *Cruger v. Heyward*, 2 Des. 94; *Cowls v. Cowls*, 3 Gilman, 435, 44 Am. D. 708; *Dawes v. Howard*, 4 Mass. 97; *Smith v. Young*, 2 Dev. & Bat. 26; *Collins v. Srunker*, 1 U. S. Mo. Law Mag. 114. "By the common law of Massachusetts, and without reference to any statute, a father, if of sufficient ability, is as much bound to support and provide for his infant children, in sickness and in health, as a husband is bound by the same law

and by the common law of England to support and provide for his wife." Metcalf, J. in *Dennis v. Clark*, 2 Cush. 347, 352, 48 Am. D. 671. See further, as to Massachusetts, *Hancock v. Merrick*, 10 Cush. 41. I have not attempted to distinguish the States in which this form of the liability is accepted. Not all the States from which cases are in this note cited, are on this side of the question.

<sup>3</sup> *Cooper v. Martin*, 4 East, 76, 84; 1 Bl. Com. 448, note of Christian and others; *Shelton v. Springett*, 11 C. B. 452; *Bazeley v. Forder*, Law Rep. 3 Q. B. 559; *Kelley v. Davis*, 49 N. H. 187; *Gordon v. Potter*, 17 Vt. 348. This is a carefully considered case; and the court rejects the doctrine of the father's liability for necessities furnished the minor child, against his consent, both on reason and a mass of English authority. The English cases cited to this by the court are *Bainbridge v. Pickering*, 2 W. Bl. 1325; *Baker v. Keen*, 2 Stark. 501; *Fluck v. Tollemache*, 1 Car. & P. 5; *Rolfe v. Abbott*, 6 Car. & P. 286; *Law v. Wilkin*, 6 A. & E. 718; *Blackburn v. Mackey*, 1 Car. & P. 1; *Seaborne v. Maddy*, 9 Car. & P. 497; *Mortimore v. Wright*, 6 M. & W. 482, 9 Law Jour. n. s. Exch. 158. See also *Hunt v. Thompson*, 3 Scam. 179, 36 Am. D. 538.

<sup>4</sup> *Bishop Con.* § 234, 908.

law a wife cannot herself.<sup>1</sup> So a child is under the more absolute control of the father and husband than is the wife; he may whip the one,<sup>2</sup> not the other.<sup>3</sup> Nor would it be promotive of filial subordination for the law to permit the spendthrift son of a man reputed rich and penurious, to carry to a jury the question whether or not Papa held his purse-strings as loosely as he ought, and provided the boy with gold watches, fast horses, finger-rings, tops, cigars, candy, and whiskey in profusion suited to his rank and fortune.<sup>4</sup> For a boy hungry or cold there is always public relief at hand, and always a public officer to compel an unwilling father to provide for his necessities. By all opinions, where a father neither refuses nor neglects to furnish the child with necessities, no third person can supply them at his charge.<sup>5</sup>

§ 1157. **Wife ordering Necessaries for Children.** — If the married parties are living apart, under circumstances rendering the husband liable for the support of the wife,<sup>6</sup> and he permits the children to reside with her, he must pay for necessities furnished by a third person for them on her request.<sup>7</sup> Such is probably the correct doctrine even where the right of the children thus to charge the father is denied; the better reason for which being that these facts constitute the wife his agent to order what the law requires him to supply. Another reason may be that since

<sup>1</sup> Vol. I. § 1246; 1 Bishop Mar. Wo-men, § 39.

<sup>2</sup> 1 Bishop Crim. Law, § 880, 881; *Gorman v. S.* 42 Tex. 221.

<sup>3</sup> Vol. I. § 1619-1621.

<sup>4</sup> **This Reasoning** — loses something of its force on comparison with the law of husband and wife, in the words of Blackburn, J. thus: "A husband, whilst his wife resides with him, chooses his own style of life, at least in theory. In the quaint language of Hyde, J. in *Manby v. Scott*, 1 Mod. 124, 138, if 'the wife will have a velvet gown and a satin petticoat, and the husband thinks mohair or farendon for a gown, and watered tabby for a petticoat, is as fashionable, and fitter for his quality,' the husband is to decide, and neither the wife nor a jury; it may be consisting of drapers and milliners. But when the husband has without cause turned his wife out of doors, or by his own fault rendered it impossible for her to reside with him, the rule is changed.

The husband is no longer the sole judge of what is fit, but the law gives the wife in such a case authority to pledge his credit for her reasonable expenses, leaving it to be determined by others what is reasonable." *Bazeley v. Forder*, Law Rep. 3 Q. B. 559, 564. See *Brown v. Deloach*, 28 Ga. 486; *Lefils v. Sugg*, 15 Ark. 137.

<sup>5</sup> *Eitel v. Walter*, 2 Bradf. 287; *Gotts v. Clark*, 78 Ill. 229; *Rogers v. Turner*, 59 Mo. 116.

<sup>6</sup> An essential element in the proposition. *Baldwin v. Foster*, 138 Mass. 449.

<sup>7</sup> *Rumney v. Keyes*, 7 N. H. 571; *Reynolds v. Sweetser*, 15 Gray, 78; *Kimball v. Keyes*, 11 Wend. 33; *Walker v. Laighton*, 11 Fost. N. H. 111; *Gill v. Read*, 5 R. I. 343, 73 Am. D. 73; *Camerlin v. Palmer Co.* 10 Allen, 539. And see *Bazeley v. Forder*, Law Rep. 3 Q. B. 559; *Atkins v. Pearce*, 2 C. B. n. s. 763; *Hancock v. Merrick*, 10 Cush. 41.

she ought to care for her own offspring, a necessary for them is such also for her.

§ 1158. **The Mother**,—being a widow, is entitled to the labor of her minor children, or to recover pay for it from an employer, while she supports them.<sup>1</sup> Precisely as to what is her legal duty to support them the authorities are not in distinct accord; in Missouri, at least, the obligation during widowhood is on her.<sup>2</sup> On her remarriage, neither she nor her second husband is compellable to maintain them.<sup>3</sup> Not even is she required to support her own children while their father, her husband, is living.<sup>4</sup>

§ 1159. **These Preliminaries**,—if they seem foreign to the subject of the chapter, place the reader in a position to comprehend its remaining sub-titles.

## II. *The Custody independently of Divorce and Divorce Proceedings.*

§ 1160. **Doctrine defined**.—In the nature of things, and in normal conditions, the custody of a child, or right to dictate its surroundings, is essential to its due education and maintenance. So that when the law casts on one the duty to educate and maintain any child, it, as a necessary consequence,<sup>5</sup> confers the right to the custody. And thus ordinarily the true good of the child is secured. But it has its own independent rights,<sup>6</sup> the chief whereof is the promotion of its own well-being; and when they require a change of custody, especially when the rights of those primarily entitled thereto have been forfeited by a negligent or

<sup>1</sup> *Volentine v. Bladen*, Harper, 9; *Dedham v. Natick*, 16 Mass. 135, 139; *Burk v. Phips*, 1 Root, 487; *Jones v. Tevis*, 4 Litt. 25, 14 Am. D. 98; *Matthewson v. Perry*, 37 Conn. 435, 9 Am. R. 339; *Hammond v. Corbett*, 50 N. H., 501, 9 Am. R. 288; *Simpson v. Buck*, 5 Lans. 337. But see *C. v. Murray*, 4 Binn. 487, 488, 5 Am. D. 412; *Fairmount, &c. Passenger Ry. v. Stutler*, 54 Pa. 375, 93 Am. D. 714; *Kennedy v. New York Cent. &c. Rld.* 35 Hun, 186.

<sup>2</sup> *Tetherow v. St. Joseph &c. Rld.* 98 Mo. 74, 14 Am. St. 617, 623, where, as on the one side or the other, the judge refers to *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. R. 441; *Nightingale v. Withington*,

15 Mass. 272, 8 Am. D. 101; *Guion v. Guion*, 16 Mo. 48, 57 Am. D. 223.

<sup>3</sup> *In re Besondy*, 32 Minn. 385, 50 Am. R. 579; *McMahill v. McMahon*, 113 Ill. 461; *Whitehead v. St. Louis, Iron Mount. &c. Ry.* 22 Mo. Ap. 60. See *Gerdes v. Weiser*, 54 Iowa, 591, 36 Am. R. 256, note.

<sup>4</sup> *Gladding v. Follett*, 95 N. Y. 652, 2 Dem. 58; *Gleason v. Boston*, 144 Mass. 25. It would be otherwise in Iowa, where by statute the support of children is cast on the parents jointly and severally. *Johnson v. Barnes*, 69 Iowa, 641.

<sup>5</sup> Ante, § 116 and note, 1151.

<sup>6</sup> Ante, § 1151.



otherwise wrongful discharge of the duties, the custody will be transferred to one who, assuming the duties, will better perform them. To particularize, —

§ 1161. **The Good of the Child** — is universally deemed to be the leading consideration, to which the claims of all other persons must yield on sufficient pressure; opinions differing as to the degree of pressure required, — a question for the judicial<sup>1</sup> discretion.<sup>2</sup> Thereupon, —

§ 1162. **Father's Right.** — As the first duty to support the child rests on the father,<sup>3</sup> he is *prima facie* and before all others — in preference, therefore, to the mother, on whom this duty is not cast<sup>4</sup> — entitled to the custody.<sup>5</sup> In a few of our States, this rule

<sup>1</sup> Ante, § 936, 996, 1006; *Brinster v. Compton*, 68 Ala. 299; *Gibbs v. Brown*, 68 Ga. 803.

<sup>2</sup> *Coffee v. Black*, 82 Va. 567; *P. v. Brown*, 35 Hun. 324; *Bryan v. Lyon*, 104 Ind. 227, 54 Am. R. 309; *In re Schroeder*, 65 How. Pr. 194; *In re Pray*, 60 How. Pr. 194; *Jones v. Darnall*, 103 Ind. 569, 53 Am. R. 545; *Sturtevant v. S.* 15 Neb. 459, 48 Am. R. 349, 353; *S. v. Grisby*, 38 Ark. 406; *Corrie v. Corrie*, 42 Mich. 509; *Haymond v. Haymond*, 74 Tex. 414; *Rowe v. Rowe*, 28 Mich. 353; *Garner v. Gordon*, 41 Ind. 92; *Faulk v. Faulk*, 23 Tex. 653; *Gardenhire v. Hinds*, 1 Head, 402; *Ex parte Hewitt*, 11 Rich. 326; *Cole v. Cole*, 23 Iowa, 433; *McKim v. McKim*, 12 R. I. 462; *Green v. Green*, 52 Iowa, 403; *In re Welch*, 74 N. Y. 299; *P. v. Turner*, 55 Ill. 280; *In re Clifton*, 47 How. Pr. 172; *Tarkington v. S.* 1 Ind. 171; *S. v. Paine*, 4 Humph. 523; *P. v. Humphreys*, 24 Barb. 521; *Mercein v. P.* 25 Wend. 64, 35 Am. D. 653; *Armstrong v. Stone*, 9 Grat. 102; *Ex parte Schumpert*, 6 Rich. 344; *U. S. v. Green*, 3 Mason, 482; *Young v. S.* 15 Ind. 480; *Ward v. Roper*, 7 Humph. 111; *Drumb v. Keen*, 47 Iowa, 435; *English v. English*, 4 Stew. Ch. 543; *S. v. Smith*, 6 Greenl. 462, 20 Am. D. 324; *In re Kottman*, 2 Hill, S. C. 363, 27 Am. D. 390; *P. v. Mercein*, 3 Hill, N. Y. 399, 8 Paige, 47, 38 Am. D. 644; *Steele v. Thacher*, 1 Ware, 91; *P. v. Chegaray*, 18 Wend. 637; *P. v. —*, 19 Wend. 16; *In re Toulmin*, R. M. Charl. 489; *S. v. Clover*, 1 Harrison, 419; *Rex v. Greenhill*, 6 Nev. & M. 244; *De Manneville v. De Manneville*, 10

*Ves.* 52, and note to Sumner's ed.; *Ball v. Ball*, 2 Sim. 35; *Jackson v. Hankey*, Jacob, 264; 2 Kent Com. 194; *Wood v. Wood*, 3 Ala. 756; *S. v. King*, 1 Ga. Decis. 93; *Rex v. Delaval*, 3 Bur. 1434, 1436; *Wellesley v. Beaufort*, 2 Russ. 1; s. c. nom. *Wellesley v. Wellesley*, affirmed in the H. of Lords, 1 Dow & C. 152; *Rex v. De Manneville*, 5 East, 221; *Rex v. Moseley*, 5 East, 224, note; *Holcombe Eq.* 259; *C. v. Maxwell*, 6 Law Reporter, 214; *Ahrenfeldt v. Ahrenfeldt*, 1 Hoffman, 497; *Anonymous*, 2 Sim. n. s. 54, 69, 11 Eng. L. & Eq. 281, 290; *S. v. Stigall*, 2 Zab. 286; *In re Hakewill*, 22 Eng. L. & Eq. 395; *P. v. Porter*, 1 Duer, 709; *Lindsey v. Lindsey*, 14 Ga. 657; *In re Hakewill*, 15 Eng. L. & Eq. 599; *S. v. Scott*, 10 Post. N. H. 274; *Gishwiler v. Dodez*, 4 Ohio St. 615.

<sup>3</sup> Ante, § 1152, 1154.

<sup>4</sup> Ante, § 1153, 1158.

<sup>5</sup> *Henson v. Walts*, 40 Ind. 170; *Bennett v. Bennett*, 43 Conn. 313; *Ex parte Boaz*, 31 Ala. 425; *Latham v. Latham*, 30 Grat. 307; *In re Besant*, 11 Ch. D. 508; *Besant v. Wood*, 12 Ch. D. 605; *P. v. Olmstead*, 27 Barb. 9; *McBride v. McBride*, 1 Bush, 15; *Hunt v. Hunt*, 4 Green, Iowa, 216; *P. v. Mercein*, 3 Hill, N. Y. 399, 38 Am. D. 644; *S. v. Paine*, 4 Humph. 523; *Steele v. Thacher*, 1 Ware, 91; *C. v. Briggs*, 16 Pick. 203; *Rex v. De Manneville*, 5 East, 221; *In re Hakewill*, 12 C. B. 223; *Hutson v. Townsend*, 6 Rich. Eq. 249; *Ex parte Vetterlein*, 14 R. I. 378; *Miller v. Wallace*, 76 Ga. 479, 2 Am. St. 48; *Brooke v. Logan*, 112 Ind. 183,

has by statutes or otherwise been made partly or fully to yield to that of the equal claims of the parents.<sup>1</sup> As the rule is ordinarily held, —

§ 1163. **Varying with Circumstances.** — When the good of the child permits, and especially when it requires,<sup>2</sup> the father's claim may be forfeited by abuse,<sup>3</sup> or otherwise another's may be preferred to it. Under laws which have prevailed in some ages and countries, rendering the child a sort of chattel in the hands of its father, who could sell or kill it, the paternal right to its custody was necessarily inflexible. But this old barbarity has gradually given way until the modern civilization concedes to the child the same human attributes which it acknowledges in the father.<sup>4</sup> In the early periods of our common law in England, this consummation had not been fully reached; so that judicial precedents from those periods are not altogether authorities for the present. Yet the precedents have been improving from age to age. And the jurisprudence on this subject has travelled in

2 Am. St. 177; *McGlennan v. Margowski*, 90 Ind. 150; *S. v. Barney*, 14 R. I. 62; *Ex parte McClellan*, 1 Dowl. P. C. 81; *Rex v. Greenhill*, 6 Nev. & M. 244, 4 A. & E. 624; *Ball v. Ball*, 2 Sim. 35; *Ex parte Hewitt*, 11 Rich. 326; *Johnson v. Terry*, 34 Conn. 259; *Pascal v. Jones*, 41 Ga. 220; *S. v. Baird*, 3 C. E. Green, 194; *S. v. Richardson*, 40 N. H. 272; *S. v. Banks*, 25 Ind. 495; *Davis v. Davis*, 19 Ill. 334, 343; *Sumner v. Sebec*, 3 Greenl. 223; *C. v. Nutt*, 1 Browne, Pa. 143; *Kiffen v. Kiffen*, cited, 1 P. Wms. 697, 705; *Allen v. Coster*, 1 Beav. 202; *Wellesley v. Wellesley*, 2 Bligh, n. s. 124; *Whitfield v. Hales*, 12 Ves. 492, and note to Sumner's ed.

<sup>1</sup> *S. v. Kirkpatrick*, 54 Iowa, 373; *In re Bort*, 25 Kan. 308, 37 Am. R. 255; *C. v. Hart*, 14 Philad. 352; *Eustice v. Plymouth Coal Co.*, 120 Pa. 299; *Smith v. Bragg*, 68 Ga. 650; And see *Jones v. Darnall*, 103 Ind. 569, 53 Am. R. 545. **Modifying Statutes.** — There are various statutes modifying the common law on this whole question. As to England, see *In re Besant*, 11 Ch. D. 508; *Besant v. Wood*, 12 Ch. D. 605; *In re Tomlinson*, 3 De G. & S. 371; *In re Fynn*, 2 De G. & S. 457. Our own modifying statutes are numerous.

<sup>2</sup> Ante, § 1161.

<sup>3</sup> *Ex parte Bailey*, 6 Dowl. P. C. 311; *Rex v. Dobbryn*, 4 A. & E. 644, note; *Rex v. Wilson*, 4 A. & E. 645, note; *Blisset's Case*, Lofft, 748; *Whitfield v. Hales*, 12 Ves. 492; *Lyons v. Blenkin*, Jacob, 245; *Wellesley v. Beaufort*, 2 Russ. 1; *In re Toulmin*, R. M. Charl. 489; *Bryan v. Bryan*, 34 Ala. 516; *P. v. Chegaray*, 18 Wend. 637; *P. v. —*, 19 Wend. 16; *Nickols v. Giles*, 2 Root, 461; *U. S. v. Green*, 3 Mason, 482; *Faulk v. Faulk*, 23 Tex. 653; *Young v. S.* 15 Ind. 480. For example, **Turning off Child.** — A father who casts his child out upon the world without caring for him relinquishes thereby the right to his custody, and absolves him from the duty of obedience. *Stansbury v. Bertron*, 7 Watts & S. 362. And see *Shelley v. Westbrooke*, Jacob, 266; *Wellesley v. Beaufort*, 2 Russ. 1; *Mytton v. Holyoake*, cited Macpherson on Infants, 149; *Clinton v. York*, 26 Me. 167. Yet such a father may be required to support the child to whose control and custody his right is forfeited. Macpherson on Infants, 142; *Cowls v. Cowls*, 3 Gilman, 435, 44 Am. D. 708.

<sup>4</sup> Ante, § 1151.

most of our States more rapidly toward the light than in England. Therefore even the present English cases are not the true guides for our American courts. Somewhat to illustrate the doctrine, —

§ 1164. **Mother's Rights.** — The mother is as near to the child in blood as the father, and presumptively and commonly her love for it is not less strong than his; and in the average case her care for it, if she has equal means, will not be less effective. Therefore by the law of nature her claim to its custody is not inferior; it is made so simply by the technical rule of the law of the land which binds him and not her to its support.<sup>1</sup> Consequently if while the parents are living apart the father has forfeited his claim to its custody, or the good of the child requires, she, other things being equal, will be preferred to him and to all other persons for custodian.<sup>2</sup> This is often so emphatically where the infant is of a tender age, specially requiring a mother's care.<sup>3</sup> Also, —

§ 1165. **As between Mother and Third Persons.** — On the father's death, the right of custody as between her and any third person is *prima facie* with her.<sup>4</sup> And her superiority to any third person is general, whether the husband is living or not.<sup>5</sup> But to render it quite effectual, she should be in a condition to bestow a mother's care, uncontrolled by an outside party. And where she is married to a second husband, and the effect of surrendering a boy to her would be to take him away from relatives by blood and bring him up under a stepfather, her maternal rights will not be deemed of controlling force.<sup>6</sup> Hence, —

§ 1166. **Third Person.** — By all opinions, English and American, there may be and are cases wherein the child, for its good, will be taken from its parents and placed in the custody of a

<sup>1</sup> Ante, § 1160, 1162.

<sup>2</sup> In re Goldsworthy, 2 Q. B. D. 75; In re Taylor, 4 Ch. D. 157; In re Fynn, 2 De G. & S. 457; Thomas v. Roberts, 3 De G. & S. 758; Ex parte Hewitt, 11 Rich. 326; Nickols v. Giles, 2 Root, 461; Cole v. Cole, 23 Iowa, 433; McBride v. McBride, 1 Bush, 15; S. v. Baird, 6 C. E. Green, 384; McKim v. McKim, 12 R. I. 462, 34 Am. R. 694; Anonymous, 55 Ala. 428; McShan v. McShan, 56 Missis. 413; P. v. Chegaray, 18 Wend. 637; P. v. —, 19 Wend. 16; Ex parte Schumpert, 6 Rich.

344; Reg. v. Baxter, 2 U. C. Q. B. 370; Moore v. Moore, 66 Ga. 336; Guardianship of Austerhandt Minors, Myrick Prob. 18.

<sup>3</sup> S. v. Baird, 3 C. E. Green, 194; S. v. Stigall, 2 Zab. 286.

<sup>4</sup> Ante, § 1153, 1158; P. v. Wilcox, 22 Barb. 178.

<sup>5</sup> P. v. Wilcox, 22 Barb. 178; Moore v. Christian, 56 Missis. 408, 31 Am. R. 375. See Sword v. Keith, 31 Mich. 247.

<sup>6</sup> Spears v. Snell, 74 N. C. 210; S. v. Scott, 10 Fost. N. H. 274; Armstrong v. Stone, 9 Grat. 102.

third person.<sup>1</sup> Yet doubtless mere poverty and want of education in a parent, however extreme, should seldom or never deprive him of his child, whatever its prospects in the offered other custody;<sup>2</sup> for the following of such a principle would be an overturning of the order of society.

§ 1167. **Relinquishing Right.** — While the parent's right of custody may be forfeited by his misconduct,<sup>3</sup> it may equally, with differing effects according to the particular case, be bargained away, cut off by estoppel, or waived, so as practically not to be recalled. Thus, —

§ 1168. **Father assigning Services — Mother.** — By the common law, a father may assign to another the services of his children during minority;<sup>4</sup> but under the statutes in many of our States he cannot do this, except in some manner which they point out.<sup>5</sup> It is doubtful whether the mother, under the common law, has the same power to bargain away the future services as the father.<sup>6</sup> And —

§ 1169. **Bargaining for Custody.** — Both the child and the public have an interest in its custody. Therefore the parents cannot by any contract not expressly authorized by law<sup>7</sup> cast off permanently, whatever temporary arrangements they may make, the personal duty and correlate right of its custody and support.<sup>8</sup> Yet this rule does not render void every sort of bargaining between the parents,<sup>9</sup> or between them and third persons, regarding the custody of the child. It is difficult to state exactly what is the doctrine as to this, but in proximate terms it is that when the undertaking of the parties is beneficial to the child, and violative of no public policy, it will be good, in other cases void.<sup>10</sup> Within this doctrine, —

<sup>1</sup> *Ex parte Warner*, 4 Bro. C. C. 101; *Wellesley v. Beanfort*, 2 Russ. 1; *Lyons v. Blenkin*, Jacob, 245; *Garner v. Gordon*, 41 Ind. 92; *Gardenhire v. Hinds*, 1 Head, 402; *In re Toulmin*, R. M. Charl. 489; *In re Clifton*, 47 How. Pr. 172; *Young v. S.* 15 Ind. 480; *Le Blanc's Succession*, 37 La. An. 546; *P. v. Brown*, 35 Hun, 324.

<sup>2</sup> *Moore v. Christian*, 56 Missis. 408, 31 Am. R. 375; *Verser v. Ford*, 37 Ark. 27. See *In re Bullen*, 28 Kan. 781.

<sup>3</sup> Ante, § 1160, 1163.

<sup>4</sup> *Day v. Everett*, 7 Mass. 145; *Phelps*

*v. Townsend*, 8 Pick. 392; *S. v. Shreve*, Coxe, 230.

<sup>5</sup> There are many authorities on this point. See *C. v. McKeagy*, 1 Ashm. 248.

<sup>6</sup> *Morris v. Low*, 4 Stew. & P. 123. See *P. v. Gates*, 43 N. Y. 40; *Pray v. Gorham*, 31 Me. 240.

<sup>7</sup> *Fitzgerald v. Fitzgerald*, 24 Hun, 370; *Farnham v. Pierce*, 141 Mass. 203, 55 Am. R. 452.

<sup>8</sup> *In re Scarritt*, 76 Mo. 565, 43 Am. R. 768.

<sup>9</sup> *Hunt v. Hunt*, 28 Ch. D. 606.

<sup>10</sup> *P. v. Mercein*, 3 Hill, N. Y. 399, 38

§ 1170. **Quasi Contract** — (**Estoppel** — **Waiver** — **Executed** — **Partly executed**). — The contract, to be effective, need not be such as could be enforced if altogether executory. If it is within the principle of equitable estoppel,<sup>1</sup> of contract executed,<sup>2</sup> of waiver,<sup>3</sup> or of a part performance of an oral undertaking which the statute requires to be in writing,<sup>4</sup> in some of which cases no consideration is required and in most of them no legal capacity for executory bargaining, it will be as good as though formally made between competent parties on a consideration. For example, —

§ 1171. **Giving away Child.** — In American cases of recent date, so numerous as to constitute an established doctrine, where one or both of the parents being poor or otherwise unable to take the care of their young child have verbally or by conduct relinquished it to competent and willing persons, commonly relatives, who have entered upon their assumed duties and established a partial or full *de facto* relation of parent and child, neither of the real parents, not even the father, on a change of mind or of circumstances, has been permitted to resume the custody, where the interests of the child would not thereby be promoted.<sup>5</sup> The reasoning to this has not commonly been the most satisfactory which the case permitted, the judicial mind often not adverting to what is most important.<sup>6</sup> Plainly, in principle, the arrangement between the parent and the new custodian need not be such as could be enforced while executory. But an entering upon a bargaining which in this sense was not valid, a payment of money under it, a bestowal of affection and personal solicitude, thus bringing the parties into new relations in their nature incapable of being reversed and the old ones resumed, — these and the other common accompaniments of this class of

Am. D. 644; C. v. St. John's Orphan Asylum, 9 Philad. 571; Cook v. Bybee, 24 Tex. 278; S. v. Baldwin, 1 Halst. Ch. 454, 45 Am. D. 399; Drumb v. Keen, 47 Iowa, 435; Johnson v. Terry, 34 Conn. 259.

<sup>1</sup> Bishop Con. § 280-310.

<sup>2</sup> Ib. § 625-630, 634.

<sup>3</sup> Ib. § 789-807.

<sup>4</sup> Ib. § 1237, 1305.

<sup>5</sup> P. v. Porter, 23 Ill. App. 196; Bryan v. Lyon, 104 Ind. 227, 54 Am. R. 309; Chapsky v. Wood, 26 Kan. 650, 40 Am. R. 321; In re Larson, 31 Hun, 539; Coffee v. Black, 82 Va. 567; Merritt v.

Swimley, 82 Va. 433; Ex parte Murphy, 75 Ala. 409; Sturtevant v. S. 15 Neb. 459, 48 Am. R. 349; Verser v. Ford, 37 Ark. 27; Bently v. Terry, 59 Ga. 555, 27 Am. R. 399; Brinster v. Compton, 68 Ala. 299; Drumb v. Keen, 47 Iowa, 435; Bonnett v. Bonnett, 61 Iowa, 199. See In re Brown, 13 Q. B. D. 614. In our neighboring New Brunswick, the court by a majority of four judges to two gave to a father the custody of his daughter, to which he would not be entitled under the doctrine of the text. In re Coram, 25 N. B. (Truman) 404.

<sup>6</sup> Ante, § 29, 922, and places there referred to.

cases present questions wholly unlike those attendant on the ordinary executory contract. If this new relation is not sustained, there has been a fraud, and the doctrine of estoppel and other kindred doctrines render it now valid. And still the child will be restored to the parent whenever its good<sup>1</sup> requires.<sup>2</sup> A disposition made of it while the mother is insane will not bar her claim on recovery.<sup>3</sup> For the actual or *quasi* estoppel whereby a sane parent may be barred cannot affect one who is insane.

§ 1172. **Bastard.**—While the mother and father of an illegitimate child are living, the right to its custody is with her, not with him.<sup>4</sup> Not even is he required to support it, except as commanded by a statute.<sup>5</sup> But when the mother is dead, the father's claim takes the precedence of that of a third person.<sup>6</sup>

§ 1173. **Consulting Child.**—In various circumstances, especially where the child is of an age to know his own wants, and more especially where the claims of the contestants are almost evenly balanced, he will be consulted, commonly in private by the judge, and permitted to go with the contestant he chooses.<sup>7</sup> But it will not be so where the child is too young to exercise an intelligent choice; for example, below ten years of age.<sup>8</sup> In reason, this sort of consideration, though not necessarily control-

<sup>1</sup> Ante, § 1161.

<sup>2</sup> *Brooke v. Logan*, 112 Ind. 183, 2 Am. St. 177; *In re Bullen*, 28 Kan. 781.

<sup>3</sup> *S. v. Reuff*, 29 W. Va. 751, 6 Am. St. 676.

<sup>4</sup> *Ex parte Knee*, 1 New Rep. 148; *Pratt v. Nitz*, 48 Iowa, 33; *In re Nofsinger*, 25 Mo. Ap. 116; *Robalina v. Armstrong*, 15 Barb. 247. In this case, Willard, P. J. said: "The father had no right to the custody of the plaintiff against her consent. *Rex v. Soper*, 5 T. R. 278; *Rex v. Hopkins*, 7 East, 579. The same principle has been repeatedly adjudged in this State. The mother of a bastard child is entitled to its custody; but if it appears that the child is abused, the court will interfere in behalf of the child, and direct it to be placed elsewhere. *P. v. Landt*, 2 Johns. 375; *Carpenter v. Whitman*, 15 Johns. 208; *P. v. Kling*, 6 Barb. 366. The rule is the same in Massachusetts, *Wright v. Wright*, 2 Mass. 109; 2 Kent Com. 215." And see *Reg. v. Nash*, 10 Q. B. D. 454; *Copeland v. S.* 60 Ind. 394; *Bustamento v. Analla*, 1 New Mex. 255.

<sup>5</sup> *Simmons v. Bull*, 21 Ala. 501, 56 Am. D. 257; *Hargroves v. Freeman*, 12 Ga. 342. See *Duncan v. Pope*, 47 Ga. 445; *Blacklaws v. Milne*, 82 Ill. 505, 25 Am. R. 339; *Nixon v. Perry*, 77 Ga. 530.

<sup>6</sup> *In re Kerr*, 22 Law Rep. Ir. 642; *Pote's Appeal*, 106 Pa. 574, 51 Am. R. 540.

<sup>7</sup> *Spears v. Snell*, 74 N. C. 210; *C. v. Hammond*, 10 Pick. 274; *C. v. Hamilton*, 6 Mass. 273; *P. v. Pillow*, 1 Sandf. 672; *S. v. Scott*, 10 Fost. N. H. 274; *S. v. Baird*, 3 C. E. Green, 194; *McShan v. McShan*, 56 Missis. 413; *P. v. Porter*, 1 Duer, 709; *S. v. Paine*, 4 Humph. 523; *S. v. Stigall*, 2 Zab. 286; *In re Watson*, 10 Abb. N. Cas. 215; *P. v. Chegaray*, 18 Wend. 637; *In re Hansen*, Edm. Sel. Cas. 9; *Ellis v. Jesup*, 11 Bush, 403.

<sup>8</sup> *S. v. Richardson*, 40 N. H. 272; *In re Hansen*, *supra*, and other cases in the last note; *S. v. Baldwin*, 1 Halst. Ch. 454, 45 Am. D. 399; *S. v. Clover*, 1 Harrison, 419; *In re Lloyd*, 3 Man. & G. 547.

ling, must be helpful to the judicial discretion.<sup>1</sup> As likewise assisting such discretion,—

§ 1174. **Parent's Fault as to Separation.**—Not quite without question while there is no suit for divorce, in a controversy between the parents as to the custody of a child, some judges look into their relative merits in what led to the separation.<sup>2</sup> Aside from which, the good or ill conduct of the husband or wife may be important on the question of fitness to have the charge of the children.<sup>3</sup> So—

§ 1175. **The Health and Age**—of the children, and the qualifications of the respective parents relating thereto, are important.<sup>4</sup> Again,—

§ 1176. **An Agreement**—as to the custody, the doctrines whereof we have already seen,<sup>5</sup> whether between the parents themselves, or a parent on the one side and a stranger on the other, together with the consideration whether it is valid or not in law, is proper matter to influence the discretion.<sup>6</sup> And—

§ 1177. **Guardian.**—The rights of a guardian should be taken into the account.<sup>7</sup>

§ 1178. **Procedure.**—There are questions of the procedure for the custody, where there is no divorce; but they are not within the scope of these inquiries, so a simple reference to representative cases will suffice.<sup>8</sup>

<sup>1</sup> Ante, § 1161.

<sup>2</sup> Post, § 1197.

<sup>3</sup> *De Manneville v. De Manneville*, 10 Ves. 52; *P. v. Olmstead*, 27 Barb. 9; *P. v. Humphreys*, 24 Barb. 521; *Ex parte Schumpert*, 6 Rich. 344; *S. v. Stigall*, 2 Zab. 236; *Reg. v. Baxter*, 2 U. C. Q. B. 370.

<sup>4</sup> *Mercein v. P.* 25 Wend. 64, 35 Am. D. 653.

<sup>5</sup> Ante, § 1167–1171.

<sup>6</sup> *Curtis v. Curtis*, 5 Gray, 535; *Faulk v. Faulk*, 23 Tex. 653; *Young v. S.* 15 Ind. 480; *Farnsworth v. Richardson*, 35 Me. 267; *Richardson v. Richardson*, 32 Me. 560; *C. v. Hammond*, 10 Pick. 274; *C. v. Hamilton*, 6 Mass. 273; *Hutson v. Townsend*, 6 Rich. Eq. 249; *S. v. Baldwin*, 1 Halst. Ch. 454, 45 Am. D. 399; *P. v. Mer-*

*cein*, 3 Hill, N. Y. 399, 38 Am. D. 644; *S. v. Clover*, 1 Harrison, 419; *Dumain v. Gwynne*, 10 Allen, 270.

<sup>7</sup> *Hughes's Case*, 1 Tucker, 38.

<sup>8</sup> *S. v. Brearly*, 2 Southard, 555; *Mercein v. P.* 25 Wend. 64, 35 Am. D. 653; *P. v. Kling*, 6 Barb. 366; *S. v. Cheeseman*, 2 Southard, 445; *Lindsey v. Lindsey*, 14 Ga. 657; *P. v. Chagaray*, 18 Wend. 637; *P. v. Porter*, 1 Duer, 709; *C. v. Briggs*, 16 Pick. 203; *P. v. Humphreys*, 24 Barb. 521; *C. v. Reed*, 59 Pa. 425; *Burr v. Wilson*, 18 Tex. 367; *C. v. Barney*, 4 Brews. 408; *Lee v. Back*, 30 Ind. 148; *Voullaire v. Voullaire*, 45 Mo. 602; *Hughes's Case*, 1 Tucker, 38; *P. v. Mercein*, 3 Hill, N. Y. 399, 38 Am. D. 644; *Mathews v. Wade*, 2 W. Va. 464; *S. v. Richardson*, 40 N. H. 272; *Davis v. Davis*, 75 N. Y. 221.

### III. *The Custody during the Divorce Suit.*

§ 1179. **The foregoing Elucidations** — have brought fully to view the principles governing the entire subject of this chapter. Some further applications of the principles, and their operation in conjunction with the statutes, remain for our further inquiries.

§ 1180. **This and the Next Sub-titles** — are in subject so nearly identical that to preserve an exact line of division between them would involve too much repetition. So a reader having occasion to consult either one ought to look into both.

§ 1181. **Statutes** — in England since 1858,<sup>1</sup> and generally in our States from early periods, have authorized the court during the pendency and on and after the termination of a divorce suit, to direct with which party or what other person the custody of the children of the marriage shall be.<sup>2</sup>

§ 1182. **Merits of Suit.** — Following the rule in temporary alimony,<sup>3</sup> the court will not ordinarily, on this *pendente lite* question of custody, look into the respective merits of the litigants. Such a procedure, prejudicing the main question in advance, it was said in one case, “would be most mischievous.” And it was added “that the duty of the court was to look at all the actual circumstances of the present application: the age of children, the position in which they find themselves in relation to other members of the family, the fact that a suit is pending between the parents, in which such and such charges are made on both sides; but not to attempt to ascertain the truth or falsehood of the charges.”<sup>4</sup>

§ 1183. **To whom Custody — (Access).** — The *ad interim* custody may be committed to one of the parents or to a third person. But in either case, a parent to whom it is not given will be permitted reasonable access to the child.<sup>5</sup>

§ 1184. **Another Court interfering.** — It is believed that when during the pendency of a divorce suit the tribunal has made an order for temporary custody, or there is an application for such order, no other court has a jurisdiction by *habeas corpus* or other-

<sup>1</sup> Vol. I. § 153, and note; 20 & 21 Vict. c. 85, § 35, amended by 22 & 23 Vict. c. 61, § 4.

§ 4.

<sup>2</sup> Post, § 1186.

<sup>3</sup> Ante, § 935, 937, 940.

<sup>4</sup> *Ryder v. Ryder*, 2 Swab. & T. 225, 227.

<sup>5</sup> *Boynton v. Boynton*, 1 Swab. & T. 324; *Curtis v. Curtis*, 1 Swab. & T. 75, 77; *Thompson v. Thompson*, 2 Swab. & T. 402.



wise to interfere therewith.<sup>1</sup> The question is less clear when no steps in the cause have been taken.<sup>2</sup> And this doctrine would seem applicable also to the permanent custody. Yet another court may in proper circumstances lend its aid to execute the mandate.<sup>3</sup>

#### IV. *The Custody on and after the Divorce.*

§ 1185. **Under Unwritten Law** — (Ecclesiastical — Equity). — In England the ecclesiastical tribunals, in a divorce cause, had no jurisdiction to determine the custody of the children. If in a particular instance it was plain the mother should be permitted to retain a child, the court could only, in awarding alimony, refuse to consider as diminishing the amount that the husband will have it to support.<sup>4</sup> The special jurisdiction in behalf of children was in the Court of Chancery.<sup>5</sup> The conclusion from which<sup>6</sup> is, in reason, that if with us a statute gives the authority in divorce to a court having equity powers, it may exercise its control over the children in the divorce suit. And in line with this reasoning, those equity courts which without statutory direction adjudge alimony where they cannot also decree divorce,<sup>7</sup> have entertained in the same suit this jurisdiction likewise.<sup>8</sup> So where there were two statutes, "the one providing for the disposition of the children in all cases of separation when neither party shall obtain a divorce; the other, investing the Court of Chancery with power, in cases of separation, to determine the same questions with respect to the children, upon the petition of either party," — it was held that the latter authority might be exercised in the divorce suit.<sup>9</sup> But this sort of question becomes of little practical importance because of the universality of the provisions of our —

§ 1186. **Statutes** — giving the jurisdiction to the divorcing

<sup>1</sup> See Vol. I. § 1448, 1461.

<sup>2</sup> In *re Delano*, 37 Mo. Ap. 185, is more qualified in terms than the text.

<sup>3</sup> *Nicholls v. Nicholls*, 3 Duer, 642; *Williams v. Williams*, 13 Ind. 523; *Sears v. Dessar*, 28 Ind. 472.

<sup>4</sup> *Greenhill v. Greenhill*, 1 Curt. Ec. 462, 6 Eng. Ec. 376, 378; *Smith v. Smith*, 2 Phillim. 152, 1 Eng. Ec. 220.

<sup>5</sup> *Eyre v. Shaftsbury*, 2 P. Wms. 102, 118; *Ex parte Warner*, 4 Bro. C. C. 101;

*Creuze v. Hunter*, 2 Cox, 242; *Warde v. Warde*, 2 Phillips, 786, and numerous other cases which it would be useless to cite.

<sup>6</sup> Ante, § 461-463.

<sup>7</sup> Vol. I. § 1393-1401.

<sup>8</sup> *Williams v. Williams*, 4 Des. 183; *Anonymous*, 4 Des. 94; *Prather v. Prather*, 4 Des. 33.

<sup>9</sup> *Hansford v. Hansford*, 10 Ala. 561, 563; *Cornelius v. Cornelius*, 31 Ala. 479.

court.<sup>1</sup> These statutes commonly, either in terms or by construction, require the jurisdiction to be exercised by the same court and in the same cause wherein the divorce proceedings transpire.<sup>2</sup>

§ 1187. **Varying Order.** — In reason, the same on this question of custody as on that of alimony,<sup>3</sup> the court should have the power to vary its decree from time to time as circumstances change. The argument that in law the power exists where not conferred by a statute is perhaps less strong in this case than in the other. But commonly with us the courts exercise it, either by direct permission of the statute or by judicial construction.<sup>4</sup> There are States wherein, in the absence of statutory authorization, the contrary is held, except<sup>5</sup> when the decree itself reserves the power.<sup>6</sup>

§ 1188. **When Vary.** — The principle is stated among the preceding expositions of alimony.<sup>7</sup> The unreversed order settles

<sup>1</sup> Ante, § 1181.

<sup>2</sup> *Bennett v. Southard*, 35 Cal. 688; *Hoffman v. Hoffman*, 15 Ohio St. 427; *Price v. Price*, 55 N. Y. 656; *Bush v. Bush*, 37 Ind. 164; *Cocke v. Hannum*, 39 Miss. 423; *Hunt v. Hunt*, 4 Greene, Iowa, 216; *Husband v. Husband*, 67 Ind. 583, 33 Am. R. 107; *Williams v. Williams*, 13 Ind. 523; *Davis v. Davis*, 75 N. Y. 221; *Barney v. Barney*, 14 Iowa, 189; *Miner v. Miner*, 11 Ill. 43. See *Shaw v. McHenry*, 52 Iowa, 182; *Landis v. Landis*, 10 Vroom, 274; *Logan v. Logan*, 90 Ind. 107; *Stetson v. Stetson*, 80 Me. 483.

<sup>3</sup> Ante, § 822-824, 869-881.

<sup>4</sup> *Neil v. Neil*, 38 Ohio St. 558; *Phillips v. Phillips*, 24 W. Va. 591; *Umlauf v. Umlauf*, 27 Ill. Ap. 375; *Dubois v. Johnson*, 96 Ind. 6; *Sherwood v. Sherwood*, 56 Iowa, 608; *Darnall v. Mullikin*, 8 Ind. 152; *Welch v. Welch*, 33 Wis. 534; *Chandler v. Chandler*, 24 Mich. 176; *Shaw v. McHenry*, 52 Iowa, 182; *Andrews v. Andrews*, 15 Iowa, 423; *Ahrenfeldt v. Ahrenfeldt*, 4 Sandf. Ch. 493; *Wilson v. Wilson*, 45 Cal. 399; *Harvey v. Lane*, 66 Me. 536; *Miller v. Miller*, 64 Me. 484; *Semrow v. Semrow*, 23 Minn. 214; *Hoffman v. Hoffman*, 15 Ohio St. 427; *Boggs v. Boggs*, 49 Iowa, 190; *Cook v. Cook*, 1 Barb. Ch. 639; *Codd v. Codd*, 2 Johns. Ch. 141; *Laurie v. Laurie*, 9 Paige, 234; *Barrere v. Barrere*, 4 Johns. Ch. 187; *Hansford v. Hansford*,

10 Ala. 561; *Paige on Div.* 302; *Collins v. Collins*, 2 Paige, 9.

<sup>5</sup> Ante, § 875, 876.

<sup>6</sup> *Cook v. Cook*, 1 Barb. Ch. 639; *Sullivan v. Learned*, 49 Ind. 252; *Crimmins v. Crimmins*, 28 Hun, 200, 64 How. Pr. 103. **English Statutes.** — Under the original Divorce Act, 20 & 21 Vict. c. 85, § 35, the power of the court to vary its orders after final decree was denied. *Robotham v. Robotham*, 1 Swab. & T. 190; *Seymour v. Seymour*, 1 Swab. & T. 332; *Curtis v. Curtis*, 1 Swab. & T. 192; *Suggate v. Suggate*, 1 Swab. & T. 492. Thereupon the authority was conferred by 22 & 23 Vict. c. 61, § 4. **Interpretations.** — For something of the interpretations of these enactments and the practice under them, see *Whieldon v. Whieldon*, 2 Swab. & T. 388; *Codrington v. Codrington*, 3 Swab. & T. 496; *Ryder v. Ryder*, 2 Swab. & T. 225; *Cooke v. Cooke*, 3 Swab. & T. 248; *Seddon v. Seddon*, 2 Swab. & T. 640; *Webster v. Webster*, 3 Swab. & T. 106; *Chetwynd v. Chetwynd*, Law Rep. 1 P. & M. 39; *Bacon v. Bacon*, Law Rep. 1 P. & M. 167; *Mallinson v. Mallinson*, Law Rep. 1 P. & M. 221; *Milford v. Milford*, Law Rep. 1 P. & M. 715; *Hyde v. Hyde*, 13 P. D. 166; *Skinner v. Skinner*, 13 P. D. 90.

<sup>7</sup> Ante, § 877-881.

the question for the facts existing at the time it is made. The revision of it proceeds upon the new facts, considered in connection with the old.<sup>1</sup> Thus, if after the custody has been decreed to the mother she abuses it by endeavors to estrange the child from the father, the court may revise the order and award it to him.<sup>2</sup>

§ 1189. **Effect of Foreign Custody Order.** — It is believed that this question can be accurately seen only by looking down below the words of cases to the fundamental doctrine. Under our National Constitution, this order is plainly a record to which, if the court has jurisdiction, the same faith and effect permitted it in the State of its rendition must be given in every other State.<sup>3</sup> And the true rule in the State of its rendition is that it is *res judicata*, concluding the question.<sup>4</sup> But it does not conclude the question for all time, since new facts may create new issues.<sup>5</sup> Nor, since the relation of parent and child is a status, rightfully, like marriage, regulated by any State in which the parties are domiciled, does the order in one State operate as an estoppel of all future inquiry in the courts of another State wherein the child has acquired a domicil. If the child is a mere transient person, the estoppel ordinarily can be little less than complete. And such would seem to be, at least not to contradict, the results to which the not very distinct adjudications have arrived.<sup>6</sup> If the divorce was *ex parte*, against a father who with his child was domiciled in another State, the decree for custody would be without jurisdiction, therefore void.<sup>7</sup>

§ 1190 *To whom award the Custody:* —

**Effect of Statute on Father's Right — (Equal).** — From the doctrine that the father's greater duty to maintain and educate the child renders his right to its custody superior to the mother's,<sup>8</sup> it results that under a statute permitting the court to fix the custody and compel the father to pay what is reasonable to the cus-

<sup>1</sup> *Dubois v. Johnson*, 96 Ind. 6; *Umlauf v. Umlauf*, 27 Ill. Ap. 375; *Jennings v. Jennings*, 56 Iowa, 288; *S. v. Bechdel*, 37 Minn. 360, 5 Am. St. 854; *White v. White*, 75 Iowa, 218.

<sup>2</sup> *Sherwood v. Sherwood*, 56 Iowa, 608; *D'Alton v. D'Alton*, 4 P. D. 87, 90.

<sup>3</sup> *Ante*, § 180-185; *Teter v. Teter*, 88 Ind. 494.

<sup>4</sup> *Ante*, § 877; *S. v. Bechdel*, 37 Minn. 360, 5 Am. St. 854; *Mercein v. P.* 25 Wend. 64, 35 Am. D. 653.

<sup>5</sup> *Ante*, § 1188.

<sup>6</sup> *Taylor v. Jeter*, 33 Ga. 195, 81 Am. D. 202; *Wakefield v. Ives*, 35 Iowa, 238; *P. v. Allen*, 40 Hun, 611, 105 N. Y. 628; *Thorn-dike v. Rice*, 24 Law Reporter, 19, 20. And see *Baily v. Schrader*, 34 Ind. 260; *Bennett v. Bennett*, Deady, 299.

<sup>7</sup> *Kline v. Kline*, 57 Iowa, 386, 42 Am. R. 47.

<sup>8</sup> *Ante*, § 1151, 1152, 1160, 1162.

todian, the claims of the parents are equal. And so our courts commonly hold, though this form of the reasoning has not always occurred to the judges.<sup>1</sup>

§ 1191. **"Just and Proper."**—The English Divorce Act authorizes the court to make such orders "as it may deem just and proper, with respect to the custody, maintenance, and education of the children."<sup>2</sup> And these words are held to place the mother substantially on an equality with the father.<sup>3</sup> But alike in England and this country, the facts of the particular case may create in the parents the utmost inequality. To explain, —

§ 1192. **Judicial Discretion.**—While the custody both of the sub-title before the last<sup>4</sup> and of this<sup>5</sup> is regulated by the judicial discretion, that of this one is freed from the technical rules which more or less embarrass the other, particularly the rule of the father's superior claim.<sup>6</sup> And still under this one the court will not disregard established principles of law.<sup>7</sup> Thus, —

§ 1193. **Good of Child.**—It is both law and common sense that the superior right goes with the superior interest. So that now, more emphatically than under the circumstances of the other sub-title, the good of the child is the controlling force in directing its custody.<sup>8</sup> Hence, —

<sup>1</sup> *Wand v. Wand*, 14 Cal. 512; *Green v. Green*, 52 Iowa, 403; *Lusk v. Lusk*, 28 Mo. 91; *Welch v. Welch*, 33 Wis. 534; *Bennett v. Bennett*, *Deady*, 299; *Hewitt v. Long*, 76 Ill. 399; *Ahrenfeldt v. Ahrenfeldt*, 1 Hoffman, 497, 502. And see *English v. English*, 4 Stew. Ch. 543.

<sup>2</sup> 20 & 21 Vict. c. 85, § 35. By construction, these words apply also to 22 & 23 Vict. c. 61, § 4.

<sup>3</sup> *Marsh v. Marsh*, 1 Swab. & T. 312, 316, 317; concurred in by the whole court in *Boynton v. Boynton*, 2 Swab. & T. 275, 277. Said Sir C. Cresswell: "The application here is not to enforce the common-law rule, but to the discretion of the court." *Spratt v. Spratt*, 1 Swab. & T. 215. Yet it is perhaps deemed in the English Divorce Court that the father has a sort of superior right even after a divorce for his fault. See observations of Sir J. P. Wilde in *Chetwynd v. Chetwynd*, Law Rep. 1 P. & M. 39, 41. And see *Cartlidge v. Cartlidge*, 2 Swab. & T. 567. But see *Milford v. Milford*, Law Rep. 1 P. & M. 715, 717.

<sup>4</sup> Ante, § 1161.

<sup>5</sup> Ante, § 1191; *Umlauf v. Umlauf*, 128 Ill. 378.

<sup>6</sup> *Powell v. Powell*, 53 Ind. 513; *Ryder v. Ryder*, 2 Swab. & T. 225, 228; *Bush v. Bush*, 37 Ind. 164; *Price v. Price*, 55 N. Y. 656; *Lusk v. Lusk*, 28 Mo. 91.

<sup>7</sup> *D'Alton v. D'Alton*, 4 P. D. 87.

<sup>8</sup> Ante, § 1161; *Haymond v. Haymond*, 74 Tex. 414; *Lyle v. Lyle*, 86 Tenn. 372; *Lambert v. Lambert*, 16 Or. 485; *Williams v. Williams*, 23 Fla. 324; *Umlauf v. Umlauf*, 128 Ill. 378; *D'Alton v. D'Alton*, 4 P. D. 87, 90; *Barrere v. Barrere*, 4 Johns. Ch. 187; *Cook v. Cook*, 1 Barb. Ch. 639; *Ahrenfeldt v. Ahrenfeldt*, 1 Hoffman, 497; *Adams v. Adams*, 1 Duv. 167; *Wand v. Wand*, 14 Cal. 512; *Cornelius v. Cornelius*, 31 Ala. 479; *Goodrich v. Goodrich*, 44 Ala. 670; *Green v. Green*, 52 Iowa, 403; *Lusk v. Lusk*, 28 Mo. 91; *Miner v. Miner*, 11 Ill. 43, 49; *Hewitt v. Long*, 76 Ill. 399. This doctrine is confirmed by statutory provisions in some of the States. And see *Trimble v. Trimble*, 15 Tex. 18.

§ 1194. **An Agreement about the Custody**,—made between the parents prior to the divorce decree, is not conclusive; for they are not the persons whose interests are primarily to be consulted.<sup>1</sup> Hence, also, —

§ 1195. **Third Person**.—In exceptional circumstances, where the good of children requires, they will be committed to the custody of a third person, in disregard of the claims of both parents.<sup>2</sup> But in Wisconsin, by construction of the statute, this cannot be done.<sup>3</sup> Still, —

§ 1196. **The Innocent Parent**,—on whose prayer the divorce is granted, will as a sort of rule, not without exceptions, have the custody. In some of the States, this is nearly or quite of course.<sup>4</sup> A woman compelled by her husband to resort to divorce “ought not,” in the words of Sir C. Cresswell, “to obtain it at the expense of losing the society of her children.”<sup>5</sup> Therefore,<sup>6</sup> and because one who has done well or ill in the marriage relation will be likely to do the same in the parental, all courts lean palpably to the innocent parent in the divorce when determining the consequential custody of a child.<sup>7</sup> In connection herewith, —

§ 1197. **The Morals of the Parent**—are an element of the highest importance in the question of custody. For the influ-

<sup>1</sup> *Cook v. Cook*, 1 Barb. Ch. 639; *Kremelberg v. Kremelberg*, 52 Md. 553. And see *P. v. Mercein*, 3 Hill, N. Y. 399, 38 Am. D. 644; *White v. White*, 75 Iowa, 218.

<sup>2</sup> *Chetwynd v. Chetwynd*, 4 Swab. & T. 151; *Chetwynd v. Chetwynd*, Law Rep. 1 P. & M. 39; *Godrich v. Godrich*, Law Rep. 3 P. & M. 134; *McCarthy v. Hinman*, 35 Conn. 538; *Green v. Green*, 52 Iowa, 403; *Rice v. Rice*, 21 Tex. 58; *Adams v. Adams*, 1 Duv. 167.

<sup>3</sup> *Hopkins v. Hopkins*, 39 Wis. 167.

<sup>4</sup> *Lemunier v. McCearly*, 37 La. An. 133; *Crimmins v. Crimmins*, 64 How. Pr. 103, 28 Hun, 200; *Lambert v. Lambert*, 16 Or. 485; *Klein v. Klein*, 47 Mich. 518.

<sup>5</sup> *Suggate v. Suggate*, 1 Swab. & T. 492, 496.

<sup>6</sup> *Boynton v. Boynton*, 2 Swab. & T. 275; *Cooke v. Cooke*, 3 Swab. & T. 248; *Chetwynd v. Chetwynd*, Law Rep. 1 P. & M. 39; *Bacon v. Bacon*, Law Rep. 1 P. & M. 167; *Milford v. Milford*, Law Rep. 1 P. & M. 715.

<sup>7</sup> *Carr v. Carr*, 22 Grat. 168; *Latham v. Latham*, 30 Grat. 307; *Welch v. Welch*, 33 Wis. 534; *Becker v. Becker*, 79 Ill. 532; *Burge v. Burge*, 88 Ill. 164; *Boyd v. Boyd*, 1 Swab. & T. 562; *Harding v. Harding*, 22 Md. 337; *Goodrich v. Goodrich*, 44 Ala. 670; *Levering v. Levering*, 16 Md. 213; *Codd v. Codd*, 2 Johns. Ch. 141; *Wand v. Wand*, 14 Cal. 512; *Noel v. Noel*, 9 C. E. Green, 137; *Scoggins v. Scoggins*, 80 N. C. 318; *Wilkinson v. Deming*, 80 Ill. 342, 22 Am. R. 192; *Bedell v. Bedell*, 1 Johns. Ch. 604; *Kingsberry v. Kingsberry*, 3 Harring. Del. 8; *Jears v. Jears*, 2 Harring. Del. 142, where there were two daughters and one son, and the court gave to the plaintiff wife the custody of the daughters only; *Clark v. Clark*, Wright, 225; *Hansford v. Hansford*, 10 Ala. 561; *Bascom v. Bascom*, Wright, 632; *P. v. Mercein*, 8 Paige, 47; *Richmond v. Richmond*, 1 Green Ch. 90; *Cook v. Cook*, 1 Barb. Ch. 639.

ence of example, especially a parent's, is controlling over children.<sup>1</sup> Therefore —

§ 1198. **An Adulterous Parent**, — whether father or mother, divorced for the proven offence, should only in the rarest circumstances be intrusted with the custody of a child. In the modern English practice, this rule is nearly or quite without exception.<sup>2</sup> In an American court it was said, as to the wife, that “a woman who has been guilty of adultery is unfit to have the care and education of children, and more especially of female children.”<sup>3</sup> And certainly an American court will not in the ordinary case commit a child to this sort of divorced mother.<sup>4</sup> Yet there is a period at which it needs the physical nurture which a father cannot give, and is too immature for the moral. So in one case the court at first refused to take the children from the mother who was living in adultery,<sup>5</sup> but when three years had been added to their age, and the father's condition had slightly improved, it transferred the custody to him.<sup>6</sup> Repentance and reformation will have great effect; and a single act of adultery, not repeated and not likely to be, whether by father or mother, has been deemed not necessarily to deprive forever the delinquent of the custody.<sup>7</sup>

§ 1199. **Desertion**, — when made ground for divorce, though equal to adultery as a recriminatory bar,<sup>8</sup> is not equal as a disqualification for the custody of children. And there are circumstances in which they, or a part of them, will be committed to the mother whose desertion has caused the divorce.<sup>9</sup>

§ 1200. **Both Objectionable**. — If both parents are objectiona-

<sup>1</sup> See *Barrere v. Barrere*, 4 Johns. Ch. 187, 197; *Anonymous*, 2 Sim. N. S. 54, 11 Eng. L. & Eq. 281.

<sup>2</sup> *Clout v. Clout*, 2 Swab. & T. 391; *Bent v. Bent*, 2 Swab. & T. 392; *Seddon v. Seddon*, 2 Swab. & T. 640; *Barnes v. Barnes*, Law Rep. 1 P. & M. 463; *Milford v. Milford*, Law Rep. 1 P. & M. 715; *Chetwynd v. Chetwynd*, Law Rep. 1 P. & M. 39; *March v. March*, Law Rep. 1 P. & M. 437.

<sup>3</sup> *Helden v. Helden*, 7 Wis. 296, 303.

<sup>4</sup> *Kremelberg v. Kremelberg*, 52 Md. 553; *Jackson v. Jackson*, 8 Or. 402; *Uhlmann v. Uhlmann*, 17 Abb. N. Cas. 236.

<sup>5</sup> *C. v. Addicks*, 5 Binn. 520.

<sup>6</sup> *C. v. Addicks*, 2 S. & R. 174. In *Valentine v. Valentine*, 4 Halst. Ch. 219,

the custody of a child was at first given to the mother on account of its tender years, and afterward transferred to the father.

<sup>7</sup> *Cook v. Cook*, 1 Barb. Ch. 639; *Dailey v. Dailey*, Wright, 514, 517. A case on the subject of this section, not altogether satisfactory, is *Williams v. Williams*, 4 Des. 183.

<sup>8</sup> Consult at large the chapter on Recrimination, ante, § 337-409.

<sup>9</sup> *Leavitt v. Leavitt*, Wright, 719; *Umlauf v. Umlauf*, 128 Ill. 378. And see *Hewitt v. Long*, 76 Ill. 399; *Welch v. Welch*, 33 Wis. 534; *Carr v. Carr*, 22 Grat. 168; *Messenger v. Messenger*, 56 Mo. 329.

ble, we have seen that the custody may be given to a third person.<sup>1</sup> But not always does the court go so far. Thus, on a dissolution for the wife's adultery, the husband was awarded the custody of the child, though he was ill-tempered, though he had abused his wife and been forgiven by her; and though in cold blood and in a manner described in the report as "both cruel and inhuman," he had killed her paramour.<sup>2</sup>

§ 1201. **Neither.** — If as mere custodian neither parent is objectionable, the ready way would seem in reason to be, to prefer the one who had not forfeited the right by committing the matrimonial offence.<sup>3</sup> Yet judges have sometimes undertaken to refine a little on this.<sup>4</sup>

§ 1202. **Very Young.** — As already intimated,<sup>5</sup> a child at the breast needs a mother's milk more than virtuous example. And beyond this, like reasons apply to an indefinite period after it is weaned. Commonly, therefore, such a child will be permitted to remain with its mother, though she is the guilty cause of the divorce, during such time as its interests require, to be determined from the facts of the particular case.<sup>6</sup> The frail health of a child, to illustrate, may greatly influence the court toward the mother.<sup>7</sup>

§ 1203. **Access** — to the child, by the parent not in custody, to a reasonable extent regulated by the decree, is commonly permitted, as due to natural justice. But the right is not absolute and universal.<sup>8</sup> For example, it appears in England to be deemed not due to an adulterous wife,<sup>9</sup> yet it has been permitted to an adulterous husband.<sup>10</sup> There probably is and can be no rule, except to determine each case by its special circumstances. To secure access, —

§ 1204. **Removal from State.** — The decree sometimes forbids

<sup>1</sup> Ante, § 1195.

<sup>2</sup> *J. F. C. v. M. E.* 6 Rob. La. 135.

<sup>3</sup> Ante, § 1196.

<sup>4</sup> *Ahrenfeldt v. Ahrenfeldt*, 1 Hoffman, 497; *Anonymous*, 4 Des. 94, 102.

<sup>5</sup> Ante, § 1198.

<sup>6</sup> *Johns v. Johns*, 57 Missis. 530; *Wagner v. Wagner*, 6 Mo. Ap. 573; *Anonymous*, 55 Ala. 428; *Draper v. Draper*, 68 Ill. 17. And see *In re Taylor*, 4 Ch. D. 157; *Landis v. Landis*, 10 Vroom, 274; *English v. English*, 4 Stew. Ch. 543; *Carr v. Carr*, 22 Grat. 168.

<sup>7</sup> *Reeves v. Reeves*, 75 Ind. 342.

<sup>8</sup> *Campbell v. Campbell*, 37 Wis. 206; *Burge v. Burge*, 88 Ill. 164; *Symonds v. Symonds*, Law Rep. 2 P. & M. 447; *Suggate v. Suggate*, 1 Swab. & T. 492; *Boyn-ton v. Boynton*, 2 Swab. & T. 275, 277; *Marsh v. Marsh*, 1 Swab. & T. 312; *Barnes v. Barnes*, Law Rep. 1 P. & M. 463; *Hill v. Hill*, 49 Md. 450, 33 Am. R. 271; *Haley v. Haley*, 44 Ark. 429.

<sup>9</sup> *Seddon v. Seddon*, 2 Swab. & T. 640.

<sup>10</sup> *Chetwynd v. Chetwynd*, Law Rep. 1 P. & M. 39, 42.

the removal of the child from the State.<sup>1</sup> On broader grounds, and where no reasons appear, courts will perhaps object to the taking of a child out of the State or country; but they will approve when such is shown to be for its good.<sup>2</sup>

§ 1205. **Till what Age** — (**Fourteen** — **Sixteen**). — The American reports furnish little enlightenment concerning any limitation of age in the decree for the child's custody, or ground for supposing that any will be made, short of majority. But in an English case Sir C. Cresswell ordered the custody of the children to the mother "until they respectively attain the age of fourteen years."<sup>3</sup> The limit of fourteen appears to have been adopted from a common idea that after this age the minor should have a voice in his own custody. Later, Sir J. P. Wilde extended this limit to the age of sixteen.<sup>4</sup> The reason was that the Court of Queen's Bench, on a *habeas corpus* by the father of a girl a little below sixteen, had ordered her return to him, as the proper deduction from certain statutes. Said Cockburn, C. J.: "The legislature has given us a guide, which we may safely follow, in pointing out sixteen as the age up to which the father's right to the custody of his female child is to continue; and short of which such a child has no discretion to consent to leaving him."<sup>5</sup> If this question should arise in any of our States having like statutes or a like rule of the unwritten law, these English determinations would be entitled to great weight. Yet if the divorce statute empowered the court to provide for the custody of the "minor" children, this specific<sup>6</sup> provision should, in the interpretation, prevail over the general law.

§ 1206. *The Procedure*: —

**Analogous to Alimony.** — As to most particulars, the chapters on alimony will furnish a sufficient guide for the procedure in custody. Therefore few additional explanations are required.

§ 1207. **Third Person applying.** — By the practice of the English Divorce Court, a third person may by leave of court present

<sup>1</sup> *Joab v. Sheets*, 99 Ind. 328; *Miner v. Miner*, 11 Ill. 43; *Campbell v. Campbell*, 37 Wis. 206; *Ryce v. Ryce*, 52 Ind. 64.

<sup>2</sup> *In re Clarke*, 17 Jur. 362, 17 Eng. L. & Eq. 599; *Dawson v. Jay*, 1 Jur. n. s. 37, 27 Eng. L. & Eq. 451; *In re Bullen*, 28 Kan. 781; *Stetson v. Stetson*, 80 Me. 483.

<sup>3</sup> *Suggate v. Suggate*, 1 Swab. & T. 492, 496, 497.

<sup>4</sup> *Mallinson v. Mallinson*, Law Rep. 1 P. & M. 221.

<sup>5</sup> *Reg. v. Howes*, 30 Law J. n. s. M. C. 47, 3 Ellis & E. 332, 337. And see *Bishop Stat. Crimes*, § 631.

<sup>6</sup> *Bishop Written Laws*, § 112 a, 126, 152, 156.



a petition for the custody.<sup>1</sup> No reason appears why the same may not be permitted with us.

§ 1208. **Security for Performance.** — In special circumstances, the court will require, from the person to whom the custody is committed, a bond with sureties that he will obey the conditions of the order;<sup>2</sup> as, that he will not take the child out of the State,<sup>3</sup> or will produce it in court when directed by the judge.<sup>4</sup>

§ 1209. **Father's Incidental Rights.** — The divorce decree for the father's fault, giving the custody of a child to the mother, has in Illinois been held so to divest him of his right that her testamentary guardian, if a suitable person, will on her death be preferred to him as the child's custodian.<sup>5</sup> The Texas Court holds the other way as to this specific question, yet permits her to bestow on the children property by will, and appoint a trustee to manage it as against the father.<sup>6</sup>

#### V. *The Maintenance of the Children after Divorce.*

§ 1210. **Father to Maintain.** — The children are no parties to the quarrels of their parents. They lose no rights thereby. Hence the father's duty to maintain them after divorce, where there is no decree of the court relating thereto, especially if their custody is not taken from him, remains as before.<sup>7</sup> But —

§ 1211. **A Judicial Decree** — for more than the mere marriage dissolution or suspension will, or not, according to its terms and the statute on which it is founded, work a different result. So that we shall here consider, First, The decree for the maintenance of the children; and, Secondly, The consequences of this decree and that for their custody.

§ 1212. **First. *The Decree for Maintenance:*** —

**The Statute** — which authorizes the court on divorce to determine the custody of the children, commonly empowers it also, if it assigns them to the wife, to award an allowance from the husband to her for their support, and to change it from time to time.<sup>8</sup>

<sup>1</sup> Chetwynd v. Chetwynd, Law Rep. 1 P. & M. 39; Godrich v. Godrich, Law Rep. 3 P. & M. 134.

<sup>2</sup> Miner v. Miner, 11 Ill. 43; Deringer v. Deringer, 10 Philad. 190.

<sup>3</sup> Miner v. Miner, supra.

<sup>4</sup> Deringer v. Deringer, supra.

<sup>5</sup> Wilkinson v. Deming, 80 Ill. 342, 22 Am. R. 192.

<sup>6</sup> McKinney v. Noble, 38 Tex. 195.

<sup>7</sup> McCarthy v. Hinman, 35 Conn. 538, 541; Courtright v. Courtright, 40 Mich. 633; Plaster v. Plaster, 47 Ill. 290; Burritt v. Burritt, 29 Barb. 124.

<sup>8</sup> Everett v. Everett, 52 Cal. 383; Harvey v. Lane, 66 Me. 536; Husband v. Husband, 67 Ind. 583, 33 Am. R. 107; Fitch v. Cornell, 1 Saw. 156; Call v. Call,

And by construction, if the decree is simply for divorce, alimony, and custody in the mother, the court may afterward add the order for the father to furnish maintenance.<sup>1</sup>

§ 1213. **Alimony**, — as explained in a preceding chapter,<sup>2</sup> is maintenance to the wife, not also to the children.<sup>3</sup> Yet in exceptional States, it is regarded as a fund out of which the wife is to support the children committed to her, equally with herself. Still in these States it is not deemed a fund held in trust for them, which in a change of circumstances can be set off to their use.<sup>4</sup> So, —

§ 1214. **Support-Money**. — Under a statute authorizing the court to “make such disposition of and provision for the children as shall appear most expedient,” there is no jurisdiction to set apart funds of either parent for their benefit except in the way of maintenance and education during minority.<sup>5</sup> Nor under this sort of statute does the wife become trustee of property awarded.<sup>6</sup> But other statutory terms may require a different rendering.<sup>7</sup>

§ 1215. **How much**. — In the ordinary case, where the funds of the marriage are vested in the husband, and a suit for divorce is pending or it has been decreed for his fault, the entire amount which would properly be consumed by the children were the cohabitation continuing should be awarded the wife for their support. The sum will depend, not only on their needs, but also on the father's means and condition in life.<sup>8</sup> In the reported cases, various amounts are mentioned; but since the facts differ, an enumeration of them would furnish no practical help to the reader.<sup>9</sup> And —

§ 1216. **The Differing Circumstances of Children** — should be con-

65 Me. 407; *Semrow v. Semrow*, 23 Minn. 214; *Wilson v. Wilson*, 45 Cal. 399; *Ahrenfeldt v. Ahrenfeldt*, 4 Sandf. Ch. 493; *Cox v. Cox*, 25 Ind. 303; *Conn v. Conn*, 57 Ind. 323; *Phelan v. Phelan*, 12 Fla. 449.

<sup>1</sup> *Plaster v. Plaster*, 47 Ill. 290; *Wilson v. Wilson*, 45 Cal. 399; *Harvey v. Lane*, 66 Me. 536; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Holt v. Holt*, 42 Ark. 495; *Washburn v. Catlin*, 97 N. Y. 623. See *Chester v. Chester*, 17 Mo. Ap. 657.

<sup>2</sup> Ante, § 1020.

<sup>3</sup> *Foot v. Foot*, 22 Ill. 425; *Whieldon v. Whieldon*, 2 Swab. & T. 388; *Richmond v. Richmond*, 1 Green Ch. 90.

<sup>4</sup> *Dow v. Dow*, 38 N. H. 188, 190.

<sup>5</sup> *Fitch v. Cornell*, 1 Saw. 156.

<sup>6</sup> *Simpson v. Simpson*, 80 Cal. 237.

<sup>7</sup> *Doscher v. Blackiston*, 7 Or. 403.

<sup>8</sup> *Richmond v. Richmond*, 1 Green Ch. 90. And see *Jeans v. Jeans*, 2 Harring. Del. 142; *Barrere v. Barrere*, 4 Johns. Ch. 187, 197; *Williams v. Williams*, 4 Des. 183; *Anonymous*, 4 Des. 94; *Bedell v. Bedell*, 1 Johns. Ch. 604. And see *Armstrong v. Armstrong*, 35 Ill. 109.

<sup>9</sup> *Whieldon v. Whieldon*, 2 Swab. & T. 388; *Moul v. Moul*, 30 Wis. 203; *Ahrenfeldt v. Ahrenfeldt*, 4 Sandf. Ch. 493; *Plaster v. Plaster*, 67 Ill. 93; *Wuest v. Wuest*, 17 Nev. 217.

sidered in connection with the father's station and means. No child ought to be brought up in idleness, and no court ought to encourage it, whatever the wealth of the parent. Yet children learning profitable trades, and especially acquiring a liberal education, can earn little or no money, and often they will be the subjects of considerable expense. So also special expenditures may be required for those in ill health.<sup>1</sup> And what any are expected to earn should be deducted from what is ordered for their support.<sup>2</sup>

§ 1217. **Support from Mother's Funds.** — Under the English statutes, the court sometimes, on a divorce, orders an appropriation from the mother's separate funds toward the support of a child the custody whereof is with the father.<sup>3</sup> We have seen that with us, as in England, a wife's funds are counted in diminution of alimony.<sup>4</sup> And as the support of children is among the ordinary family expenses, it would seem to follow that if with us the custody of a child is committed to a mother having independent means, she should be held to contribute toward its support, thus diminishing the claim on the father. Even if this were not so directly, the court within a principle before stated<sup>5</sup> could withhold the custody unless she would undertake to yield what was just.

§ 1218. **Varying or terminating Allowance.** — The periodical sum may be increased, diminished, or ended, as changed circumstances require.<sup>6</sup> Said the Chancellor in a New Jersey case: "From the evidence now before the court, I incline to the opinion that if the daughter continues in health, the allowance for her support should cease when she attains the age of eighteen. I will hear an application on this ground from the father at the proper time. No bill is necessary for that purpose. The application may be made by petition."<sup>7</sup>

§ 1219. Secondly. *The Consequences of a Particular Decree, or its Absence, to Father, Mother, and Child:* —

**Support-money ordered and paid.** — Within a principle stated as to alimony,<sup>8</sup> it is plain that if the court orders support-money to be paid to the person to whom it intrusts the custody, and the

<sup>1</sup> *Plaster v. Plaster*, 67 Ill. 93.

<sup>2</sup> *Plaster v. Plaster*, 47 Ill. 290, 292, 293, 53 Ill. 445. And see *Buck v. Buck*, 60 Ill. 105, 241.

<sup>3</sup> *Webster v. Webster*, 3 Swab. & T. 106; *Seatel v. Seatel*, 4 Swab. & T. 230.

<sup>4</sup> Ante, § 831-833.

<sup>5</sup> Ante, § 867, 868.

<sup>6</sup> *Kerr v. Kerr*, 9 Daly, 517; *Reid v. Reid*, 74 Iowa, 681.

<sup>7</sup> *Snover v. Snover*, 2 Beasley, 261, 263.

<sup>8</sup> Ante, § 838.

husband regularly and promptly pays it, no one can sustain any claim against him for necessities furnished the child.

§ 1220. **No Order.**—If the court makes no order, either for custody or support, the divorce leaves the father's liability as at common law,<sup>1</sup> explained in our first sub-title. But that liability, we saw, differs in our States, and in none is distinctly defined. Where, in Pennsylvania, a wife deserted her husband before the birth of her child, then he obtained a dissolution of the marriage for this desertion, but the decree was silent as to the child, the court would not permit her to retain the custody against the father, who was willing to take and maintain it, and thereupon compel him to pay her for necessities which she supplied.<sup>2</sup> This decision, which is plainly correct on these facts, is not in conflict with what is held in some of the other States; namely, that the mere divorce does not terminate the father's liability,<sup>3</sup> and that in a proper case, after the marriage is dissolved, he may be answerable to the mother for maintenance rendered the children while living with her.<sup>4</sup> Adding now to the problem other facts,—

§ 1221. **Mother made Guardian.**—If by an act of the law, whether legislative or judicial,—as, a clause in the legislative divorce act, or a court order other than in the divorce cause,—the mother after a marriage dissolution is made guardian of the children, their right of support from the father is not forfeited, they are not emancipated, and their settlement in law follows his, not the mother's, with whom they are living.<sup>5</sup> So that after a legislative dissolution, and the appointment of the mother as guardian of the minor children, the father was adjudged liable at the common law to compensate her, and a stranger whom she had married, for the education and support furnished them.<sup>6</sup> Now,—

<sup>1</sup> Ante, § 1210.

<sup>2</sup> *Fittler v. Fittler*, 33 Pa. 50, 57.

<sup>3</sup> Ante, § 1210.

<sup>4</sup> *Courtright v. Courtright*, 40 Mich. 633; *Grunhut v. Rosenstein*, 7 Daly, 164; *Gilley v. Gilley*, 79 Me. 292, 1 Am. St. 307.

<sup>5</sup> *Marlborough v. Hebron*, 2 Conn. 20; *Stanton v. Willson*, 3 Day, 37, 3 Am. D. 255; *Leavitt v. Leavitt*, Wright, 719; *Cowls v. Cowls*, 3 Gilman, 435, 44 Am. D. 708; *Buckminster v. Buckminster*, 38 Vt. 248, 88 Am. D. 652.

<sup>6</sup> *Stanton v. Willson*, 3 Day, 37, a Connecticut case. And see the observations of the court, upon this case, in *Gordon v. Potter*, 17 Vt. 348. But the New York Court refused to recognize this doctrine to its full extent; and Platt, J. who gave the opinion, observed: "The obligation to support the children of that marriage was equal upon both the parents,—there being no special contract between the parties, nor any provision upon that subject in the statute granting the divorce. The only provision in regard to the chil-

§ 1222. **Services and Support together.** — It seems to be a principle of the unwritten law that the right to the services of the children, and the obligation to maintain them, go together.<sup>1</sup> Let us, therefore, add this principle to our problem. Next we augment it by the fact that the court's order gives —

§ 1223. **Custody to Wife — Silent as to Support.** — There have been differences of opinion, amounting in some instances to a stumbling on the “not-thought-of”<sup>2</sup> rock, as to the effect of a decree simply giving the custody to the wife, yet silent as to the maintenance. Does such a decree, to which the children were not parties, deprive them of the right to be supported by the father? Does it so take from him their services as to relieve him of the duty to maintain them?<sup>3</sup> We have one case in which the court decided that because after the decree “he had no right, either to take the child and support it himself, or to employ any one else to support it, without the mother's consent,” he was not answerable for necessities furnished by a third person.<sup>4</sup> But it was his own wrong that deprived him of the custody. And it is fundamental, equally in our law and in natural reason, that no one can cast off an obligation by refusing to keep it, or any duty by any evil doing. Therefore a better-reasoned case holds that the duty of support “is not to be evaded by the husband's so conducting himself as to render it necessary to dissolve the bonds of matrimony, and give to the mother the custody and care of the infant offspring. It is not the policy of the law to deprive children of their rights on account of the dissensions of their parents, to which they are not parties; or to enable the father to convert his own misconduct into a shield against parental liability.”<sup>5</sup>

dren (and that was made upon the express application and request of [the mother] Mrs. Bird), was that the father should be divested of the custody and control of them, and that the mother should be their sole guardian. The mother being under equal natural obligation with the father to maintain her offspring, and no positive law of-Connecticut being shown on that subject, I can see no legal ground to authorize a recovery by the mother against the father for the maintenance of the children. At most, she can have a right to sue for a contribution only.” *Pawling v. Willson*, 13 Johns. 192, 209. Something

like this seems to be also the doctrine in Kansas. *Harris v. Harris*, 5 Kan. 46.

<sup>1</sup> Ante, § 1154, and the cases there cited.

<sup>2</sup> Ante, § 922 and citations there.

<sup>3</sup> Ante, § 1222.

<sup>4</sup> *Brow v. Brightman*, 136 Mass. 187, 189.

<sup>5</sup> *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 458, 4 Am. St. 542, 543. A simple reference to cases will probably give all the further help on this question possible. *Finch v. Finch*, 22 Conn. 411; *Courtright v. Courtright*, 40 Mich. 633; *Husband v. Husband*, 67 Ind. 583, 33 Am. R. 107;

§ 1224. *The Doctrine of this Chapter restated.*

The parts of any legal subject are inter-dependent. So, in truth, are all the parts of the whole legal system. In the present instance, it was impossible to obtain an accurate view of the rules governing the custody and support of children during divorce proceedings and afterward, without also considering their custody and support outside of divorce. Parents are required by the law to maintain their offspring. They cannot cast off the obligation by its neglect or by any other wrong. Commonly where this duty to a child exists, connected therewith is the right to its services. But a father who by ill-doing forfeits his claim to its services and custody does not thereby free himself from his own duty of support. Such are specimens of the doctrines explained in this chapter. They comprehend a good deal of detail, and it is not deemed best further to travel over the ground a second time.

Lancaster v. Lancaster, 29 Ill. Ap. 510; Holt v. Holt, 42 Ark. 495; Gilley v. Gilley, 79 Me. 292, 1 Am. St. 307; Chandler v. Dye, 37 Kan. 765; Pierce v. Pierce, 64 Wis. 73, 54 Am. R. 581; Eustice v. Plymouth Coal Co. 120 Pa. 299; Ramsey v. Ramsey, 121 Ind. 215; Maddox v. Patterson, 80 Ga. 719; Gill v. Read, 5 R. I. 343, 73 Am. D. 73; Rumney v. Keyes, 7 N. H. 571.

## BOOK XII.

SPECIFIC DIVORCE AND NULLITY SUITS AS TO THE  
PLEADING, EVIDENCE, AND PRACTICE.

## CHAPTER XXXVIII.

## IN RETROSPECT AS TO THE COURT AND JURISDICTION.

§ 1225. **This Chapter**, — not repeating former reasonings, is intended as a simple reminder to the practitioner of some of the conclusions. Thus, —

§ 1226. **Without Statutory Help**, — a court having equity powers may take the jurisdiction to declare void a marriage for fraud, mistake (in marriage law commonly termed error),<sup>1</sup> duress, or insanity (otherwise called lunacy).<sup>2</sup> A mere common-law tribunal has this jurisdiction only when given by a statute.<sup>3</sup> The inherent equity powers may perhaps be made by special circumstances to extend further than as thus stated; for example, to —

§ 1227. **Polygamy**. — If a fraud brings a polygamous marriage before an equity tribunal, we have seen that it is authorized to declare the nullity.<sup>4</sup>

§ 1228. **The Canonical Defects**, — having been cognizable solely by the ecclesiastical courts when our country was settled, and not having been recognized by the common-law and equity ones, except as a statute required them to set bounds to the ecclesiastical power,<sup>5</sup> no non-ecclesiastical tribunals with us, such as our common-law and equity courts, have by our unwritten law any jurisdiction over them.<sup>6</sup> Therefore without statutory aid, a mar-

<sup>1</sup> Vol. I. § 529.

<sup>2</sup> Ante, § 803.

<sup>3</sup> Ante, § 801, 802.

<sup>4</sup> Ante, § 804.

<sup>5</sup> Vol. I. § 261-264.

<sup>6</sup> Ante, § 805.

riage with us cannot be judicially pronounced void for impotence<sup>1</sup> or for consanguinity or affinity.<sup>2</sup> And —

§ 1229. **All the other Defects**, — whether they render the marriage void or voidable, are within the same principle which thus by our unwritten law excludes a jurisdiction over the canonical ones. Otherwise expressed, the authority to pronounce the nullity for those other defects when our country was settled was exclusively in the ecclesiastical courts. And they were not within any jurisdictional principle — for example, fraud, on account of which equity would decree an ordinary contract void — giving to either a common-law or an equity judge the authority to hear the nullity suit. Therefore, in the absence of ecclesiastical courts, our only jurisdiction to pronounce a marriage void for any of these other defects is statutory. Again, —

§ 1230. **Divorce from Valid Marriage**. — When our country was settled, there was no jurisdictional principle recognized either at common law or in equity, under which a court not ecclesiastical could suspend or dissolve a valid marriage. Not even the ecclesiastical courts could render the dissolution decree; their divorce from such a marriage was always from bed and board. Therefore our jurisdiction in the like cases is exclusively statutory. The conclusion from all which is that —

§ 1231. **Our Jurisdiction**, — with the single exception above mentioned,<sup>3</sup> is wholly statutory.<sup>4</sup> And if a statute gives the jurisdiction, its repeal before the granting of the divorce, though after the dereliction and while the suit is pending, takes it away.<sup>5</sup> Still, —

§ 1232. **Domicil**. — While a statute must be obeyed within the State enacting it, only of comity will it have any force beyond. The consequence whereof is that whatever be the terms of the jurisdictional statute, no divorce will be internationally valid unless one of the parties has a domicil within the State of its rendition. But a repetition of the explanations on this and kindred questions is not required.<sup>6</sup> This sort of defect in the jurisdiction has been deemed so absolute as to permit the objection to be raised at any time during the divorce trial.<sup>7</sup>

<sup>1</sup> Ante, § 805; Vol. I. § 279; *Burtis v. Burtis*, 1 Hopkins, 557, 14 Am. D. 563.

<sup>2</sup> Vol. I. § 279.

<sup>3</sup> Ante, § 1226, 1227.

<sup>4</sup> For something of the interpretation of the jurisdictional statute, see Vol. I. § 161-167. For some particular ones, see

*Elzey v. Elzey*, 1 Houst. 308; *Smith v. Smith*, 47 Missis. 211.

<sup>5</sup> *Grant v. Grant*, 12 S. C. 29, 32 Am. R. 506.

<sup>6</sup> Ante, § 1-200, 589-594.

<sup>7</sup> *Sommers v. Sommers*, 16 Bradw. 77.



## CHAPTER XXXIX.

## INSANITY.

§ 1233. **Elsewhere.** — A chapter in the first volume explains at large the law of insanity,<sup>1</sup> not including the evidence. The rules of law there stated are to some degree in special forms, derived from what is distinctive in marriage. But the evidence of insanity is practically the same in the nullity suit as in other litigation; so the reader is referred to the author's treatment in "Criminal Procedure," as helpful in connection with this chapter.<sup>2</sup>

§ 1234. **The Issue** — is, whether or not, when a fact of marriage transpired between the parties, either one of them was so disordered, immature, or imperfectly constituted mentally as to be incapable of giving the matrimonial consent; or, if then incapable, whether afterward they voluntarily, both knowing what had taken place, cohabited with restored or perfected capacity for consent.<sup>3</sup>

§ 1235. **The Libel** — must allege a fact of marriage, and this must be proved.<sup>4</sup> It must add thereto a charge of the insanity which wrought the nullity. The following is believed to be alike adequate and convenient, —

That on, &c. at, &c. a due form of marriage was had between your libellant and the libellee, her name then being X,<sup>5</sup> and that the same did not then or afterward constitute matrimony, by reason that she was at the time of said formal solemnization and continually thereafter a lunatic and insane [*or*, by reason that your libellant was then of weak and partially disordered intellect, and his formal yet not actual consent thereto was brought about by, &c. *setting out facts of fraud or conspiracy.*]

§ 1236. **Subsequent Ratification.** — Probably so much of this form as practically denies a ratification by subsequent sanity and cohabitation<sup>6</sup> is superfluous, and a practitioner might choose to

<sup>1</sup> Vol. I. § 587-645.

<sup>2</sup> 2 Bishop Crim. Proced. § 664-687 *b*.

<sup>3</sup> And see particularly Vol. I. § 588,

<sup>4</sup> Ante, § 604, 732, 734, 737.

<sup>5</sup> Ante, § 605.

<sup>6</sup> Vol. I. § 614-632.

595-601, 614-626.

omit it. For whatever the allegations of the libel, a defence of this kind should, both in averment and proof, be set up by the libellee.

§ 1237. **Burden of Proof — Presumptions.** — Explanations of the burden of proof of insanity, and the presumptions of sanity, appear in "Criminal Procedure."<sup>1</sup> Applying the doctrines to the present subject, when a fact of marriage between parties of adequate age is established, their mental capacity will be presumed, and one alleging the contrary must prove it.<sup>2</sup> For *prima facie* sanity, not insanity, is the mental condition of every person.<sup>3</sup> And —

§ 1238. **Continuous Sanity or Insanity.** — With this presumption blends another; namely, that a condition of things shown as of a particular date is presumed to have been the same also before and after,<sup>4</sup> the weight of the presumption diminishing as we recede either way from the date, until at a distance not well defined it disappears. So that, for example, to establish insanity at the time of the marriage, evidence of its existence either before or after, at a period not too remote,<sup>5</sup> is relevant.<sup>6</sup> Applying this doctrine to —

§ 1239. **Permanent and Temporary Insanity — (Burden of Proof).** — If insanity of a permanent nature is once shown against the marriage, the burden of proof is said to shift, requiring one who claims that there was a lucid interval at the celebration to prove it.<sup>7</sup> But where the insanity is of the temporary sort, coming

<sup>1</sup> 2 Bishop Crim. Proced. § 669-675.

<sup>2</sup> *Browning v. Reane*, 2 Phillim. 69, 1 Eng. Ec. 190; *Wheeler v. Alderson*, 3 Hag. Ec. 574, 598, 5 Eng. Ec. 211, 223; 1 Hale, P. C. 33; *Legeyt v. O'Brien*, Milward, 325, 334; *Powell v. Powell*, 27 Missis. 783; *Cannon v. Smalley*, 10 P. D. 96, 98; *Durham v. Durham*, 10 P. D. 80. See *Chambers v. The Queen's Proctor*, 2 Curt. Ec. 415, 7 Eng. Ec. 151; 1 Fras. Dom. Rel. 45.

<sup>3</sup> *Achey v. Stephens*, 8 Ind. 411; *Anderson v. Cranmer*, 11 W. Va. 562; *Jarrett v. Jarrett*, 11 W. Va. 584; *O'Brien v. P.* 48 Barb. 274.

<sup>4</sup> Vol. I. § 1125, 1126.

<sup>5</sup> *Castor v. Davis*, 120 Ind. 231.

<sup>6</sup> 2 Bishop Crim. Proced. § 674; *Banker v. Banker*, 63 N. Y. 409; *Anderson v. Cranmer*, 11 W. Va. 562; *Jarrett v. Jar-*

*rett*, 11 W. Va. 584; *St. George v. Biddeford*, 76 Me. 593.

<sup>7</sup> *Turner v. Meyers*, 1 Hag. Con. 414, 4 Eng. Ec. 440, 442; *Terry v. Buffington*, 11 Ga. 337, 56 Am. D. 423; *Haynes v. Swann*, 6 Heisk. 560; *Frazer v. Frazer*, 2 Del. Ch. 260. See *Groom v. Thomas*, 2 Hag. Ec. 433, 4 Eng. Ec. 181; *Cartwright v. Cartwright*, 1 Phillim. 90, 1 Eng. Ec. 47; *Grimani v. Draper*, 12 Jur. 925; *White v. Driver*, 1 Phillim. 84, 1 Eng. Ec. 44; *Achey v. Stephens*, 8 Ind. 411; *Wray v. Wray*, 33 Ala. 187; *Kemble v. Church*, 3 Hag. Ec. 273, 5 Eng. Ec. 107, where the long interval of seventeen years between the insanity proved and that alleged was held to be a material circumstance. And see on this question *Aibery v. Ashe*, 1 Hag. Ec. 214, 3 Eng. Ec. 89; *Brogden v. Brown*, 2 Add. Ec. 441, 2 Eng. Ec. 367; 1 Greenl. Ev. § 42.

and going with some exciting cause, he who relies upon it must show that it, or its cause, was in operation at the very time of the nuptials.<sup>1</sup> For example, —

§ 1240. **Drunkenness producing Insanity.** — A person may be drunk in a way rendering him incapable of marriage, or drunk and capable.<sup>2</sup> Thereupon, if it appears that a party was in the habit of too deep drinking and insanity accompanied it, the further proof that in form he was at a particular time married, with no evidence that he was then drunk or then insane, will not establish a nullity.<sup>3</sup> But if it is still further shown that at the nuptials he was drunk, the insanity is made out.<sup>4</sup>

§ 1241. **Conduct at Marriage Ceremony.** — Insane persons may do what appears rational. It is, therefore, no sufficient evidence of a lucid interval that one shown to have been previously insane conducted with propriety at the marriage solemnization,<sup>5</sup> or that he knew the marriage ceremony was being performed.<sup>6</sup> In the words of Sir John Nicholl, "Foolish, crazy persons might be instructed to go through the formality of the ceremony, though wholly incapable of understanding the marriage contract."<sup>7</sup>

§ 1242. **Parties — Weight of Evidence.** — If the insane person has recovered his reason, being of full age, any suit on his behalf to establish the nullity of the marriage must be brought in his own name.<sup>8</sup> But one thus pleading his own former incapacity

<sup>1</sup> *Legeyt v. O'Brien*, Milward, 325, 334, 335. See also *White v. Wilson*, 13 Ves. 87; *Hall v. Warren*, 9 Ves. 605, 611; *Ayrey v. Hill*, 2 Add. Ec. 206, 209, 2 Eng. Ec. 269, 271; *Wheeler v. Alderson*, 3 Hag. Ec. 574, 5 Eng. Ec. 211; *Brogden v. Brown*, 2 Add. Ec. 441, 2 Eng. Ec. 367; *Stewart v. Redditt*, 3 Md. 67; *Corbit v. Smith*, 7 Iowa, 60, 71 Am. D. 431; *Smith v. Smith*, 47 Missis. 211.

<sup>2</sup> Vol. I. § 607-609.

<sup>3</sup> *Parker v. Parker*, 2 Lee, 382, 6 Eng. Ec. 165.

<sup>4</sup> *Brown v. Johnston*, Ferg. Consist. Law Rep. 229. See also *Browning v. Reane*, 2 Phillim. 69, 1 Eng. Ec. 190.

<sup>5</sup> *Ray Med. Jurisp. Insan.* 2d ed. § 200; *Turner v. Meyers*, 1 Hag. Con. 414, 4 Eng. Ec. 440, 444.

<sup>6</sup> *Hunter v. Edney*, 10 P. D. 93, 95.

<sup>7</sup> *Browning v. Reane*, 2 Phillim. 69, 1 Eng. Ec. 190, 197. See also *Parker v. Parker*, 2 Lee, 382, 6 Eng. Ec. 165. There is

nothing contrary to this view in *Anonymous*, 4 Pick. 32, where the court is reported to have said "that the fact of a party's being able to go through the marriage ceremony with propriety was *prima facie* evidence of sufficient understanding to make the contract." This is a brief case, and only the reporter's version of it purports to be given. But if the court employed this language, it was spoken in reference to the facts in litigation (Vol. I. § 111), where, contrary to the formula of the text, there was no sufficient proof of prior insanity. So the court uttered merely the common doctrine that in the absence of proof of insanity, especially in a case where the party appeared sane at the marriage solemnization, sanity is *prima facie* presumed.

<sup>8</sup> *Wightman v. Wightman*, 4 Johns. Ch. 343; *Turner v. Meyers*, 1 Hag. Con. 414, 4 Eng. Ec. 440.

has the burden of proof heavily on him.<sup>1</sup> In all cases, and aside from this consideration, the evidence to establish a nullity should be very definite and conclusive.<sup>2</sup> We have already considered how the proceeding is when a party is insane while it is being carried on.<sup>3</sup> A special effect in evidence is given to a —

§ 1243. *Commission of Lunacy*: —

**In Brief.** — The putting of one under a commission of lunacy or guardianship does not, in the absence of special words in the statute,<sup>4</sup> disqualify him in law to marry, if in fact he is sane at the nuptials. But it is *prima facie* evidence of insanity, varying with the statutory terms and the circumstances; thus, —

§ 1244. **In Principle — Parties — Status.** — The parties in the lunacy proceeding and in the marriage controversy are not the same. Therefore, if there were no other consideration, the conclusion in the former would not be admissible evidence in the latter. But there is another consideration; namely, lunacy, like marriage, and some other things, is a status. So that, for example, one adjudged a lunatic in a foreign country may be treated as such also in our own.<sup>5</sup> Whence it follows that on the question of a mere ordinary contract, the inquisition establishing lunacy is, as evidence of incapacity, admissible.<sup>6</sup> Much more should this rule prevail in marriage which, like lunacy, and still more emphatically, is a status. Hence, —

§ 1245. **Admissible — Not Conclusive.** — The finding on an inquisition that during a period which includes the date of a marriage the party was insane, is receivable in evidence as tending to show its nullity.<sup>7</sup> The doctrine derivable from causes other than matrimonial appears to be that the verdict proves insanity *prima facie*, but it may be rebutted.<sup>8</sup> In a matrimonial cause, Sir John Nicholl seems to have given it even less effect. He said: “The finding is a circumstance, and a part of the evidence, in support of the unsoundness of mind at the time

<sup>1</sup> Turner v. Meyers, *supra*.

<sup>2</sup> Slais v. Slais, 9 Mo. Ap. 96.

<sup>3</sup> Ante, § 516-532; Bradford v. Abend, 89 Ill. 78, 31 Am. R. 67; Thayer v. Thayer, 9 R. I. 377.

<sup>4</sup> Vol. I. § 602.

<sup>5</sup> Ex parte Gillman, 2 Ves. Jr. 588.

<sup>6</sup> Faulder v. Silk, 3 Camp. 126; Frank v. Mainwaring, 2 Beav. 115; Jacobs v. Richards, 18 Beav. 300; Elliot v. Ince, 7

De G. M. & G. 475. And see In re Sottomaior, Law Rep. 9 Ch. Ap. 677.

<sup>7</sup> Portsmouth v. Portsmouth, 1 Hag. Ec. 355, 3 Eng. Ec. 154. And see Ex parte Glen, 4 Des. 546.

<sup>8</sup> Sergeson v. Sealy, 2 Atk. 412; Yates v. Boen, 2 Stra. 1104; Faulder v. Silk, 3 Camp. 126; Baxter v. Portsmouth, 5 B. & C. 170; 2 Greenl. Ev. § 371.

of the marriage, but no more; for this court must be satisfied by evidence of its own that grounds of nullity existed." And in the case in which these observations occur, the plaintiff did not in fact rely upon this evidence alone.<sup>1</sup> In reason, since the verdict is evidence, while still it is not an estoppel, the practical rule is to accord to it just the effect, neither more nor less, which in the particular case it actually produces upon the minds of the triers of the fact.<sup>2</sup>

§ 1246. **Illustrative Case.** — In South Carolina, in 1836, a man was found by an inquisition of lunacy, which he never traversed, to be of unsound mind. He married in 1838, and died in 1850, leaving issue who claimed to be his heirs and distributees. The inquisition was held to be *prima facie* evidence of matrimonial incapacity, no more. "In reference to proceedings in lunacy," said Dunkin, Ch., "our courts adopt the practice of Westminster Hall, as it existed prior to 1721, so far as is consistent with our institutions. In this view, the Stat. 2 Edw. 6, giving the right of traverse, has been held applicable, although not expressly declared to be of force in this State by any legislative enactment."<sup>3</sup>

§ 1247. **Other Cases.** — A North Carolina committee brought suit to avoid an idiot's marriage, which, like the one just mentioned, was entered into subsequently to the finding of the commission. And it was laid down that the commission was not conclusive of the idiocy; and there was even a query whether or not it was so much as *prima facie* evidence; yet under all the facts a sentence of nullity was pronounced.<sup>4</sup> There are in other States non-matrimonial cases which hold that an inquest of lunacy is conclusive evidence *eo tempore*, but only *prima facie* such as to any subsequent time.<sup>5</sup> And generally in our States, but in somewhat varying shades of doctrine, whenever one under guardianship as insane does an act, his insanity is so far presumed as to cast on the opposing party the burden of proving sanity; though some appear to make the fact of guardianship only an item of evidence toward establishing the insanity, which the party alleging it has the burden throughout of proving.<sup>6</sup> Still, —

<sup>1</sup> Portsmouth v. Portsmouth, supra.

<sup>2</sup> Ante, § 787-790.

<sup>3</sup> Keys v. Norris, 6 Rich. Eq. 388, 390.

<sup>4</sup> Johnson v. Kincade, 2 Ire. Eq. 470.

<sup>5</sup> Clark v. Trail, 1 Met. Ky. 35; Lucas v. Parsons, 23 Ga. 267.

<sup>6</sup> Rogers v. Walker, 6 Pa. 371, 47 Am. D. 470; Stone v. Damon, 12 Mass. 488;

§ 1248. **The Statutory Terms** — may be controlling, and in no case is it safe to disregard them. Thus, in Pennsylvania, one found by inquisition to be an habitual drunkard is incompetent to enter into any contract binding his estate; but if he has the requisite mental capacity, his marriage may be good. And where such a person, about marrying, executed a bond for the benefit of his intended wife, it was held to be void, but the marriage valid.<sup>1</sup>

§ 1249. *The Doctrine of this Chapter restated.*

In a suit to declare a marriage null for insanity, the fact of marriage and the insanity must be alleged and proved by the plaintiff. If the defendant claims that assuming the marriage to have been originally void, it was made good by the implied ratification of a subsequent cohabitation during a sane period, he must set up this defence both in allegation and in proof. The *prima facie* presumption is that the party was sane; if insanity of a permanent nature is proved as of a particular date, it is presumed to have existed both anterior and subsequently to such date. If intermittent insanity is shown, there is no presumption that it existed at any particular time; as, the time of a proven marriage. But if both intermittent insanity and its cause are made to appear, then if this cause is proven to have been in operation at the time of the nuptials, the party is presumed to have been then insane. A commission of lunacy or a guardianship for insanity does not in strict law incapacitate the party to marry, unless the statute so declares; but it creates a presumption of the disqualifying insanity.

Hopson v. Boyd, 6 B. Monr. 296; Lucas v. Parsons, *supra*; Field v. Lucas, 21 Ga. 447; Thomasson v. Kercheval, 10 Humph. 322; Little v. Little, 13 Gray, 264; Mc-

Ginnis v. C. 74 Pa. 245; Banker v. Banker, 63 N. Y. 409.

<sup>1</sup> Imhoff v. Witmer, 31 Pa. 243, 245. And see Wadsworth v. Sharpsteen, 4 Seld. 388, 59 Am. D. 499.

## CHAPTER XL.

## FRAUD AND DURESS.

- § 1250, 1251. Introduction.  
 1252-1258. Fraud.  
 1259, 1260. Duress.  
 1261. Doctrine of Chapter restated.

§ 1250. **Elsewhere** — (**Law — Jurisdiction**). — The law of this subject is explained in the first volume.<sup>1</sup> And we have seen in other connections that the remedy is within the equity jurisdiction of the unwritten law.<sup>2</sup> Added to which, there are in most of the States statutes expressly conferring the authority on a court designated.

§ 1251. **How Chapter divided**. — We shall consider, I. Fraud; II. Duress. No separate treatment will be required for Mistake, commonly in marriage law termed Error.<sup>3</sup>

I. *Fraud*.

§ 1252. **How the Allegation**. — We have intimations that a mere averment of fraud, with no particulars, is adequate in a court of common law; "because covin is so secret, whereof by intendment another man cannot have knowledge," and fraud "may be in the heart of one only;"<sup>4</sup> and because they "usually consist of a multiplicity of circumstances, and therefore it might be inconvenient to require them to be particularly set forth."<sup>5</sup> But while these considerations might excuse minuteness in the allegations, in reason, and it is believed by the better practice both at law and in equity, the nature of the fraud should with

<sup>1</sup> Vol. I. § 450-550.

<sup>2</sup> Ante, § 803, 1226. And see Fowler v. McCartney, 27 Missis. 509.

<sup>3</sup> For the law as to which, see Vol. I.

§ 529-537.

<sup>4</sup> Tresham's Case, 9 Co. 108 a, 110.

<sup>5</sup> Hill v. Montagu, 2 M. & S. 377, 378.

such precision as is conveniently practicable appear in averment.<sup>1</sup> Applying this doctrine to the nullity suit, —

§ 1253. **Form.** — It is believed that the following is adequate and sufficiently convenient; namely, —

That on, &c. at, &c. a pretended marriage was after due formalities of law entered into between your petitioner and the respondent, whose name theretofore and then was X;<sup>2</sup> and that then and since continually the said pretended marriage was and remains void and of no effect; because he says [here set out the fraud; as] that your petitioner being unmarried and capable of matrimony, the said X and one Y combined, conspired, and confederated together to cause him by fraud to marry her the said X; in pursuance whereof the said X and the said Y severally, falsely, and fraudulently represented to your petitioner that she the said X was a virgin, undefiled by man; and of wholly uncorrupted morals. And your petitioner, relying on said false and fraudulent representation, and believing the same to be true, thereupon promised to marry the said X, and then and there entered upon the pretended marriage as aforesaid. Whereas in truth and in fact, as the said X and the said Y then and there knew, the said X was not of pure morals, and not a virgin, and not undefiled by man; but on the contrary was, at the time of said representations and said pretended marriage, with child by some man to your petitioner unknown, and shortly after said pretended marriage, on, &c. at, &c. she was delivered of said child. And your petitioner further says that simultaneously with and on the discovery of the pregnancy aforesaid, and by reason of the said fraud, he disclaimed said pretended marriage, and ceased to cohabit with said X.<sup>3</sup>

§ 1254. **Own Fraud.** — It is believed that one cannot set up his own fraud as ground for nullity, though such fraud would not prevent his maintaining a suit controlled by other elements.<sup>4</sup>

§ 1255. *The Evidence:* —

**Burden of Proof.** — It is general doctrine, applicable equally in divorce causes and all others, that he who charges fraud takes upon himself emphatically the burden of the proof; because, being a dereliction of duty, it will not be presumed.<sup>5</sup> Yet —

<sup>1</sup> Cutter v. Adams, 15 Vt. 237; Ad-dington v. Allen, 11 Wend. 374; Bayard v. Malcolm, 2 Johns. 550; Barney v. Dewey, 13 Johns. 224; Barber v. Morgan, 51 Barb. 116; McCaleb v. Peery, 5 Hayw. 88; Pendleton v. Galloway, 9 Ohio, 178; Very v. Levy, 13 How. U. S. 345, 361; Gouverneur v. Elmendorf, 5 Johns. Ch. 79; Ferris v. Ferris, 8 Conn. 166, which was a nullity case.

<sup>2</sup> Ante, § 605.

<sup>3</sup> And see Bishop v. Redmond, 83 Ind. 157. For a form of the allegation held

inadequate under a statute requiring the "setting forth particularly and specially" of the grounds of complaint, see Hoffman v. Hoffman, 30 Pa. 417, 419. And see Eyre v. Potter, 15 How. U. S. 42. **Specification of Particulars.** — As to whether the filing of a specification of the particulars will cure this sort of defect, see the former case, and Steele v. Steele, 1 Dall. 409.

<sup>4</sup> Vol. I. § 546; Miles v. Chilton, 1 Rob. Ec. 684.

<sup>5</sup> Joyce v. Joyce, 5 Cal. 161; Coulson v. Coulson, 5 Wis. 79; Flint v. Jones, 5



§ 1256. **Weight of Evidence.** — The evidence need not go to the extent of absolutely excluding every other conclusion.<sup>1</sup> “It is not true,” said Black, C. J., “that fraud can *never* be presumed;” since commonly the evidence is only circumstantial.<sup>2</sup> Therefore the party on whom is the burden of proof should be allowed full latitude, the court excluding nothing which is not plainly irrelevant.<sup>3</sup>

§ 1257. **Confessions.** — in these as in other divorce and nullity causes,<sup>4</sup> are, uncorroborated, insufficient evidence of the fact.<sup>5</sup>

§ 1258. **Admissions by Co-conspirator.** — Doubtless, when the needful foundation is laid,<sup>6</sup> the declarations of the defendant’s co-conspirator, who is not a party, are admissible. But where the alleged fraud consisted of a conspiracy between the defending woman and a man by whom she was with child, to procure her marriage to the complainant by the representation that she was chaste, the former Court of Chancery in New York held this third person’s admission of being the child’s father incompetent to rebut the legal presumption of paternity in the husband.<sup>7</sup>

## II. *Duress.*

§ 1259. **Analogous to Fraud.** — The doctrines of the last subtitle, stated with reference to fraud, are almost equally applicable to duress. Thus, —

§ 1260. **Form.** — The allegation of the duress may follow that given for fraud down to the bracket,<sup>8</sup> then proceed: —

That then and there one Y, conspiring and combining with the said X, locked your petitioner into a room with bolted and barred windows and doors, the said Y declaring and threatening that your petitioner should not depart thence until he had married the said X. Whereupon your petitioner, in terror of said confinement, and fearing for his life, then and there, and while said force was upon him, went through with said form of marriage, solely to obtain his liberty, and never thereafter cohabited with the said X, or otherwise acknowledged her to be his wife.<sup>9</sup>

Wis. 424; *Stewart v. English*, 6 Ind. 176; *Hollister v. Loud*, 2 Mich. 309.

<sup>1</sup> *Seligman v. Kalkman*, 8 Cal. 207; *Parkhurst v. McGraw*, 24 Missis. 134.

<sup>2</sup> *Kaine v. Weighey*, 22 Pa. 179, 183.

<sup>3</sup> *Gist v. McJunkin*, 2 Rich. 154.

<sup>4</sup> *Ante*, § 707-729.

<sup>5</sup> *Dawson v. Dawson*, 18 Mich. 335.

<sup>6</sup> 1 Bishop Crim. Proc. § 1248; 1 Greenl. Ev. § 111.

<sup>7</sup> *Montgomery v. Montgomery*, 3 Barb. Ch. 132.

<sup>8</sup> *Ante*, § 1253.

<sup>9</sup> For a form adjudged sufficient, see *Brant v. Brant*, 17 Philad. 655. For the substance of the allegation where the duress consisted of an arrest for bastardy without warrant, see *James v. Smith*, reported Vol. I. § 544, note.

§ 1261. *The Doctrine of this Chapter restated.*

The pleading, practice, and evidence in the nullity suit for fraud or duress comprehend little that is special to marriage law. The practice common in other sorts of litigation for these wrongs does not require much modification to adapt it to the suit for nullity. In the libel, there should be a reasonable setting out of the facts constituting the fraud or duress, a simple averment that the pretended marriage was brought about by the one or the other not being adequate. The burden of proof is on the plaintiff as in other cases. Further particulars need not be repeated.

## CHAPTER XLI.

## IMPOTENCE.

- § 1262-1264. Introduction.
- 1265-1268. Delicacy and Infrequency of Suit.
- 1269-1276. Delay, Insincerity, Age.
- 1277-1285. How the Allegation.
- 1286-1297. Triennial Cohabitation.
- 1298-1315. Inspection of the Person.
- 1316-1320. Other Questions of Evidence.
- 1321. Doctrine of Chapter restated.

§ 1262. **Elsewhere.** — The law of this impediment to marriage, including some questions which with nearly equal propriety might have been reserved for this chapter, is explained in the first volume.<sup>1</sup>

§ 1263. **The Jurisdiction,** — otherwise than as provided by particular statutes, depends on principles stated in the opening chapters of the present volume. In New Jersey, by the divorce legislation, the parties or one of them must have been an inhabitant of the State where the injury complained of transpired. And impotence is held to be a continuing injury, so that neither party need have resided in the State where the marriage was celebrated.<sup>2</sup>

§ 1264. **How Chapter divided.** — We shall consider, I. The Delicacy and Infrequency of the Suit; II. Delay in bringing the Suit, Insincerity therein, and Age; III. How the Allegation; IV. Triennial Cohabitation; V. Inspection of the Person; VI. Other Questions of Evidence.

### I. *The Delicacy and Infrequency of the Suit.*

§ 1265. **No Bar to Right.** — It has already been explained that the delicate nature of a cause, or the indecency of the required

<sup>1</sup> Vol. I. § 757-797.

<sup>2</sup> A. B. v. C. B. 7 Stew. Ch. 43.

evidence, is no obstruction in law to the bringing of the suit, the making of the necessary averments, and the producing of the witnesses and their testimony.<sup>1</sup>

§ 1266. **Infrequent and why** — (**Man — Woman**). — Before the parties were by modern statutes made witnesses, the proof of this impediment was often specially difficult, — tending to reduce the number of complaints in court. Besides which, one “need not be a profound physiologist,” observed Lord Stowell, “to know how rarely the structure of the body is deficient for the purposes of our nature.” And persons conscious of lacking what is required in matrimony will not often marry; or, when they or those ignorant of their unfitness do marry, the injured party will not always complain. The defect is said to be more frequent in men than in women. In 1820, this learned judge stated in the Consistory Court of London, according to one report, that three suits only had been brought by the man within the last sixty years, and that these had been unsuccessful, as was also the one then before him.<sup>2</sup> Sir John Nicholl, in the same year, said in the Court of Arches that there had been but one suit by the husband within his recollection.<sup>3</sup> Since the proofs have been facilitated by making the parties witnesses, the number of these suits has —

§ 1267. **Increased.** — Assuming the proportions to be about equal in England and the United States, and selecting a brief period in England since the parties were witnesses, — namely, from the establishment of the Divorce Court in 1858<sup>4</sup> to and including the year 1872, — we have the following. The Reports by Swabey & Tristram and the Law Reports for this period contain fifteen reported cases; in eight of which the wife was applicant against the husband, in four the husband against the wife, in one the husband sued for adultery and the wife unsuccessfully resisted the suit by a counter claim for his impotence, in one the wife sued the husband for cruelty and he showed in answer her impotence and obtained a decree of nullity for it, and in one it was attempted to prevent a husband from administering on the

<sup>1</sup> Ante, § 770, 776.

<sup>2</sup> *Briggs v. Morgan*, 3 Phillim. 325, 1 Eng. Ec. 408. According to the report of this case in 2 Hag. Con. 324, 326, he said: “Cases of this kind, brought by the husband against the wife, are certainly not very frequent; it is said that there have not been more than two instances

established by proof in sixty years, which it requires no very deep physiology to account for.” And see *Devanbagh v. Devanbagh*, 5 Paige, 554, 557, 28 Am. D. 443.

<sup>3</sup> *Norton v. Seton*, 3 Phillim. 147, 1 Eng. Ec. 384, 386.

<sup>4</sup> Vol. I. § 153.

effects of his deceased wife by setting up his impotence during the marriage.

§ 1268. **Difficulties in Proof where Parties not Witnesses.** — "Before the law of evidence was altered by admitting both parties to tell their own tale," observes Sir J. P. Wilde, "the matrimonial tribunal stood in a very different position from what it now occupies in relation to cases of this delicate and critical character. Except the answer upon oath of the accused party,<sup>1</sup> the sole means of judgment were the outward and bodily signs revealed on medical inspection. This condition of things had at least one merit, if it had greater defects. Its merit lay in this, that it became very difficult for a woman to approach the court, save with those cogent signs of virginity which constituted reliable proof that the marriage had really never been consummated. And this was surely a merit; for it saved the court from possible imposition upon this fact, and limited the number of suits to those rare cases in which, from some cause or other, no sexual intercourse had taken place."<sup>2</sup> In most of the modern cases in which the defect is in the man, it has proceeded from some weakness produced not improbably by self-indulgence;<sup>3</sup> then, if the woman was a widow at marriage, or if from any cause she is wanting in the signs of virginity when she asks relief from the court,<sup>4</sup> it becomes difficult for her to make out her case, however just, where the parties, who alone know the real facts, are forbidden to testify.

<sup>1</sup> Ante, § 452, 463.

<sup>2</sup> F. v. D. 4 Swab. & T. 86, 92, 93.

<sup>3</sup> Of the fifteen cases mentioned in the last section, there is, I think, no one in which the fact appeared that there was in the man any defect discoverable by inspection. In some, the wife had a divorce for his inability, though the evidence of the inspectors was quite distinct in affirming his apparent power; for example, in *M. v. H.* 3 Swab. & T. 517, 520, 522, "organs of generation perfectly healthy, rather more than usually vigorous in dimensions and appearance," yet the woman was found to be a virgin after three years' cohabitation, and to be apt, and the court granted her a divorce.

<sup>4</sup> It is well known that the signs of virginity, where in fact it exists, are often uncertain. I have looked through the

eight cases mentioned in the last section, wherein the woman was the petitioner; in *H. v. C.* 1 Swab. & T. 605, the signs of virginity were destroyed, but she was able to show that it had occurred in a course of medical treatment; in *S. v. E.* 3 Swab. & T. 240, a medical witness who examined the woman believed her to be "a virgin, but it is a difficult question, in some cases you cannot be mistaken, in others you may;" in *M. v. H.* 3 Swab. & T. 517, there was a "perfect hymen;" in *M. v. B.* 3 Swab. & T. 550, "a hymen;" in *F. v. D.* 4 Swab. & T. 86, the inspectors of the wife "cannot determine whether she is a virgin;" in *L. v. H.* 4 Swab. & T. 115 (reversed 35 Law J. n. s. P. & M. 105) "a hymen;" in *T. v. D.* Law Rep. 1 P. & M. 127, "the physical appearances are, to say the least, consistent with the consumma-

## II. *Delay in bringing the Suit, Insincerity therein, and Age.*

§ 1269. **Why? — Elsewhere — Here.** — Doubtless the causes disclosed in the last sub-title have in many instances been efficient promoters of that delay in bringing the suit, which, being wrongly attributed to indifference, has given the question of delay and insincerity special prominence in impotence. We considered the subject generally in a preceding chapter,<sup>1</sup> and it remains here simply to make the application to the present topic there promised.

§ 1270. **Impotence contrasted with Fraud.** — The acquiescence which renders good a marriage originally void for fraud<sup>2</sup> has no analogies in the law of impotence. Mere cohabitation with knowledge, consummation remaining impossible, not only does not bar the suit for impotence in the ordinary case, but it does not even when it occurs while the litigation is progressing.<sup>3</sup> On the other hand, we shall further on see that it aids the proofs. Now, —

§ 1271. **Doctrine defined.** — If the applicant for the nullity decree desires, not it, but something else, which he is endeavoring thus to obtain by indirect means, he is not entitled to what he does not want. This his insincerity destroys his suit.<sup>4</sup> And any unnecessary delay will be adverted to by the court as bearing on this question of insincerity.<sup>5</sup>

§ 1272. **Proofs Weak.** — Because the evidence to any fact diminishes in reliability as time recedes,<sup>6</sup> delay is disastrous to this nullity cause in proportion to the weakness of the proofs. "Where," said the Lord Chancellor in the House of Lords, "there is conclusive evidence of the non-consummation of a marriage,"<sup>7</sup>

tion of the marriage;" in *U. v. J.* Law Rep. 1 P. & M. 460, the same. Again, according to medical testimony in one case, though the marriage was consummated, the hymen may remain. *L. v. H.* 4 Swab. & T. 115.

<sup>1</sup> Ante, § 410-437.

<sup>2</sup> Vol. I. § 545.

<sup>3</sup> Ante, § 910, note; *M. v. H.* 3 Swab. & T. 592.

<sup>4</sup> Ante, § 433.

<sup>5</sup> *Briggs v. Morgan*, 2 Hag. Con. 324, 330; s. c. 3 Phillim. 325, 1 Eng. Ec. 408; *Anonymous*, Deane & S. 295; *Castleden*

*v. Castleden*, 9 H. L. Cas. 186, where it appears, as the Lords viewed the case, that the woman brought the suit after many years' delay, simply because the husband ceased to support her, not caring for the injury she complained of, and Lord Chancellor Campbell put the doctrine thus: "Lapse of time, coupled with that indirect motive, is considered of itself an absolute bar." p. 191. For this case in its earlier stage, see ante, § 436.

<sup>6</sup> Bishop Con. § 1351.

<sup>7</sup> Which, he says, was the case of *Lewis v. Hayward*, 35 Law J. N. S. Mat. 105.

lapse of time is a circumstance susceptible of explanation. But" it becomes highly material "where," for example, "you have to judge between the contradictory statements of the husband and the wife."<sup>1</sup> Thus are explained in part the —

§ 1273. **Differing Effects of Delay — (Husband — Wife).** —

Where the husband was promoter in a case of obvious malformation, a delay of seven years was said to be almost a bar.<sup>2</sup> His delay of even sixteen months has occasioned suspicion;<sup>3</sup> and we have intimations that lapse of time, it not appearing how long a time, may operate as an absolute bar to his suit.<sup>4</sup> Yet plainly the facts special to the case will qualify the effect of the delay. When, therefore, a wife resisted five years all efforts at consummation, then her impotence was discovered, and twelve years after the marriage she submitted to an operation which was without success, and two years still later the husband brought his nullity suit, it was adjudged that relief was not forfeited by the delay.<sup>5</sup> Moreover, the wife is not held to the same promptness as the husband. The modesty of the sex may account for forbearance by her.<sup>6</sup> Where her proof consisted of non-consummation after a triennial cohabitation, no objection was made to a twelve years' waiting.<sup>7</sup>

§ 1274. **Other Cases** — in considerable numbers have passed to judgment in the English courts. But toward establishing a rule in years, they have progressed only to the demonstration that such a rule would be impossible, and that each case must be decided on its individual merits.<sup>8</sup>

<sup>1</sup> *Cuno v. Cuno*, Law Rep. 2 H. L. Sc. 300, 302. And see *S. v. A.* 3 P. D. 72, 75.

<sup>2</sup> *Guest v. Shipley*, 2 Hag. Con. 321, 4 Eng. Ec. 548. And see *Harris v. Ball*, in *Norton v. Seton*, 3 Phillim. 147, 155, and remarks of Sir John Nicholl in the latter case, 1 Eng. Ec. 384, 385, 386.

<sup>3</sup> *Briggs v. Morgan*, 3 Phillim. 325, 330, 1 Eng. Ec. 408, 410.

<sup>4</sup> *Harris v. Ball*, cited in *Norton v. Seton*, 3 Phillim. 147, 159, 1 Eng. Ec. 384, 386.

<sup>5</sup> *A. B. v. C. B.* 7 Stew. Ch. 43. And see *Langevin v. Barette*, 4 Rev. Leg. (Queb.) 160.

<sup>6</sup> Sir John Nicholl, in *Norton v. Seton*, 3 Phillim. 147, 159, 1 Eng. Ec. 384, 386; *Lorenz v. Lorenz*, 93 Ill. 376, 379.

<sup>7</sup> *Pollard v. Wybourn*, 1 Hag. Ec. 725, 3 Eng. Ec. 308; *Rogers Ec.* 2d ed. 641. Where a wife's suit was brought twenty-one years after the separation, and twenty-five after the marriage, the majority of the court held under the circumstances of the particular case that divorce should be refused. *H. v. C.* 1 Swab. & T. 605. Affirmed, on appeal, by the House of Lords. *Castleden v. Castleden*, 9 H. L. Cas. 186.

<sup>8</sup> Consult *B——n v. M——e*, 2 Rob. Ec. 580; *B——n v. B——n*, 28 Eng. L. & Eq. 95, 101; s. c. in all its stages, 1 Spinks, 248; Anonymous, Deane & S. 295, 298–300; *H. v. C.* 1 Swab. & T. 605, affirmed on appeal; *Castleden v. Castleden*, 9 H. L. Cas. 186; *E. v. T.* 3 Swab. & T. 312;

§ 1275. **Adultery — (Or Fornication)** — by the competent party is not, we have seen, a recriminatory bar to the nullity suit.<sup>1</sup> Nor does it have such effect when combining with the inadequate delay.<sup>2</sup>

§ 1276. **Age of Parties.** — The sentence of nullity will be less readily granted for this cause to persons considerably advanced in years than to those who are younger, though there seems to be no age which will be an absolute bar.<sup>3</sup> The inspection of the person, generally necessary as a part of the proofs, is deemed more odious in proportion to the years;<sup>4</sup> and when the woman is past the period of child-bearing, and the passions of both are mollified by the physical changes which time brings, and the injury is therefore less, the court becomes reluctant, though not necessarily declining, to interfere. On these grounds, the ecclesiastical libel always set out the respective ages of the parties.<sup>5</sup> But there is no evidence that such an allegation is required either in the practice of the English Divorce Court<sup>6</sup> or in that of our own tribunals. And no principle occurs to the author making it obligatory.

### III. *How the Allegation.*

§ 1277. **General.** — The complaint should aver the marriage, as already explained,<sup>7</sup> and the impotence. And it is a rule in all pleading that simply to charge a wrong by its name does not suffice; the fact or combination of facts constituting it must, to a degree conveniently practicable, be stated.<sup>8</sup> Therefore the defect constituting the particular impotence, and distinguishing it from

Harrison v. Harrison, 3 Swab. & T. 362; M. v. B. 3 Swab. & T. 550; T. v. D. Law Rep. 1 P. & M. 127; W. v. R. 1 P. D. 405; M. v. D. 10 P. D. 75; G. v. M. 10 Ap. Cas. 171. There are not many American cases to this question, but the doctrine seems to be the same in them as in the English. Lorenz v. Lorenz, 93 Ill. 376; Peipho v. Peipho, 88 Ill. 438. In New York, there is a statute of limitations applicable to these cases. Kaiser v. Kaiser, 16 Hun, 602.

<sup>1</sup> Ante, § 347, 798.

<sup>2</sup> M. v. D. 10 P. D. 75; G. v. M. 10 Ap. Cas. 171; A. B. v. C. B. 11 Scotch Sess. Cas. 4th ser. 1060; s. c. nom. C. B. v. A. B. 12 Ib. H. L. 36.

<sup>3</sup> W. v. H. 2 Swab. & T. 240.

<sup>4</sup> In Shafto v. Shafto, 1 Stew. Ch. 34, the order to inspect the wife was denied on the ground of her age, which was sixty-nine. But see W. v. H. supra.

<sup>5</sup> Briggs v. Morgan, 2 Hag. Con. 328, 330; s. c. 3 Phillim. 325, 1 Eng. Ec. 408. And see W. v. R. 1 P. D. 405, 411; Shafto v. Shafto, supra.

<sup>6</sup> A form of the petition for impotence, in Browne Div. 4th ed. 601, does not have this averment.

<sup>7</sup> Ante, § 604-611, 1235.

<sup>8</sup> For illustrations of this doctrine, see 1 Bishop Crim. Proc. § 323, 325, 329, 493, 497, 509, 514



other cases, should be set out in a way to show in fact a specific incapacity, but not averring also the evidence.<sup>1</sup>

§ 1278. **Form outlined.** — The following is believed to be a good outline of a form, which may be filled up to suit the individual case: —

That on, &c. at, &c. your petitioner, whose name was A,<sup>1</sup> entered into a pretended marriage under due formalities with the respondent X; but she avers that said marriage then was and continually since has remained void, by reason that the said X then was and continually since has been incurably impotent in his parts of generation, to wit [specifying as far as the particular facts permit], so that he has never been able to consummate and has not consummated said marriage by carnal knowledge of your petitioner, who, she avers, has at all times been and remains apt and willing therefor.

§ 1279. **Ecclesiastical Form — Defect not Obvious.** — It has been explained that by reason of an unavoidable prolixity the ecclesiastical precedents are unadapted to our use.<sup>2</sup> Still the author, bringing together the parts of some forms for impotence, and rejecting what with us would plainly be superfluous,<sup>3</sup> has collected the following, for the very common case of a defect not palpable, but ascertainable only by trial and time: —

That your petitioner and the respondent, from and after the fact of marriage as and at the time aforesaid, until the bringing of this suit, lay naked and alone together in one and the same bed during every night, both in good health, that your petitioner was during all such time apt and fit to receive the embraces of man, and to be carnally known by the respondent, and was willing and gave herself to be so known, but that he, the respondent, was at no time able to consummate such marriage by carnal knowledge of your petitioner. And she avers that she remains and is a virgin unknown by man, and that, by reason of imperfections and disease, which she is unable further to particularize, in the sexual organs of the respondent, he was, at the time of his said pretended marriage with your petitioner, and still is, incapable of consummating said marriage, or carnally knowing woman, and that his said incapacity is irremediable and incurable.<sup>4</sup>

§ 1280. **Form in Divorce Court.** — A woman's petition in the English Divorce Court was, in a reported case, in substance as follows: —

First, that on, &c. the petitioner being about twenty-four years of age, and the respondent twenty-six <sup>5</sup> [proceeding to allege the fact of marriage].

<sup>1</sup> Aleson v. Aleson, 2 Lee, 576; Lewis v. Lewis, cited 2 Lee, 579.

<sup>2</sup> Ante, § 452, 456, 575.

<sup>3</sup> Coote Ec. Pract. 370-376, 385, 386.

<sup>4</sup> For a form not unlike this, in a case before the English Divorce Court, see Serrell v. Serrell, 2 Swab. & T. 422, 423.

<sup>5</sup> As to age, see ante, § 1276.

Secondly, that from the said date, the petitioner lived with the said respondent at, &c. but that the said respondent was at said date, and has ever since continued to be, wholly unable to consummate his said marriage by reason of the malformation of his parts of generation, and that such malformation is incurable by art or skill.

Thirdly, that the said respondent was, at the time of his said marriage, and has ever since continued to be, wholly unable to consummate the said marriage by reason of the frigidity and impotence of his parts of generation, and that such frigidity and impotence of his parts of generation are wholly incurable by art or skill.<sup>1</sup>

§ 1281. **Incurable.** — As every pleading, to be adequate, must allege all facts essential to a *prima facie* case, while yet, with an exception immaterial here, it need not anticipate and answer defences;<sup>2</sup> and as a sexual impediment to consummation, to be a ground for divorce, must be incurable, or practically so,<sup>3</sup> — it follows that the incurable nature of the particular impotence must in some way appear in averment. And so are the approved precedents, nor have we decisions justifying a departure therefrom. But on a statute permitting a sentence of nullity “when either party at the time of the contract of marriage was, and still is, impotent,” the charge that then “the defendant was, and still is, impotent, in that the mouth of the vagina of the said Margaret was and still is closed, so as to prevent copulation,” was adjudged adequate. The reason given was that the term “impotent” implies incurability.<sup>4</sup> But this decision is contrary to the established rules of good pleading, which require the facts to be stated, not left thus to an inference. Undoubtedly the word “incurable” is not always required. Various forms of amputation of the man, or of malformation of the man or woman, might be suggested, the averment whereof would as distinctly convey the idea of incurability as if it were alleged in terms. Other forms would not.<sup>5</sup> To allege the latter, and no more, would not make a *prima facie* case.

§ 1282. **“Corporal Imbecility.”** — It was adjudged inadequate to aver that “at the time of their intermarriage the said Abel was, and ever since has been, and now is, laboring under a corporal imbecility;” because there is here no suggestion of its permanence

<sup>1</sup> M. v. H. 3 Swab. & T. 517; s. c. nom. Marshall v. Hamilton, 10 Jur. n. s. 853.

<sup>2</sup> Vol. I. § 786-789.

<sup>3</sup> Kempf v. Kempf, 34 Mo. 211.

<sup>4</sup> 1 Bishop Crim. Proc. § 325, 326, 328, and accompanying places.

<sup>5</sup> And see on this question, Peipho v. Peipho, 88 Ill. 438.

or incurability. "I would not intimate," said Bissell, J., "that the record need contain grossly indelicate statements. But surely enough should be stated to enable the court to see that the case demands their interference."<sup>1</sup>

§ 1283. **Fraud**, — though sometimes mentioned in elucidations of the law of impotence, is not an essential element.<sup>2</sup> Ordinarily there is no room for it; for not many impotent persons, knowing their infirmity, marry. Therefore in practice the libel does not charge fraud, nor in reason need it.<sup>3</sup>

§ 1284. **Virgin and Apt**. — The old books and precedents seem almost to make it a part of the woman's case that she was a virgin and capable,—*virgo intacta, apta viro*.<sup>4</sup> But the precedent above given from the late English practice contains neither of these allegations.<sup>5</sup> And it appears not to have been objected to. Virginity is not in law essential to the woman's right to the nullity sentence;<sup>6</sup> nor, plainly, is her proven capacity, which, being the common condition of mankind, will be presumed, an element in her *prima facie* case. Indeed, it is believed, on a question not free from dispute, that her own impotence will not bar her suit on the allegation of the man's impotence.<sup>7</sup> The conclusion from all which is that in no circumstances is the averment either of virginity or of capacity necessary, yet sometimes it is convenient and practically desirable.<sup>8</sup>

§ 1285. **Joining Different Sorts of Impotence**. — Frigidity and absolute incapacity may be charged together in the same libel. The objection once made to this was that the proofs are different, — a triennial cohabitation being required for the former, not the latter. But it was overruled.<sup>9</sup>

<sup>1</sup> *Ferris v. Ferris*, 8 Conn. 166, 168.

<sup>2</sup> Vol. I. § 763, 764.

<sup>3</sup> *Ferris v. Ferris*, 8 Conn. 166.

<sup>4</sup> Vol. I. § 780; ante, § 1279.

<sup>5</sup> Ante, § 1280.

<sup>6</sup> Ante, § 1268.

<sup>7</sup> Vol. I. § 792.

<sup>8</sup> In *L. v. H.* 4 Swab. & T. 115, 116, the petition, after setting out the marriage and age of the parties, charged that the respondent, who was the husband, was then by reason of the frigidity and impotence of his parts of generation, and has ever since continued to be, unable to con-

summate it by carnal copulation, notwithstanding that the said petitioner cohabited and constantly occupied the same bed with him, until, &c., and resided with him in the same house, till, &c., and the said petitioner was apt and willing to receive his conjugal embraces; adding that the incapacity was incurable by art or skill. For a respondent's allegation of the petitioner's impotence, in bar of a suit for adultery, see *Serrell v. Serrell*, 2 Swab. & T. 422.

<sup>9</sup> *Welde v. Welde*, 2 Lee, 578.

IV. *Triennial Cohabitation.*

§ 1286. **Impotence not Obvious.** — In a considerable proportion of the cases the organs, whether of the man or woman, give no certain indication, either to the party or to a physician who examines them, of sexual incapacity. Or it may not be certain that a discovered difficulty is past remedy; as, where a woman complained of the man's member as soft and short, the court said this did not always continue.<sup>1</sup> For these cases, —

§ 1287. **The Rule** — is that if there has been no sexual intercourse after an ostensible cohabitation as husband and wife for three years, or for a less time with other facts which in conjunction with the less cohabitation satisfy the tribunal of the impotence, it may be deemed established.

§ 1288. **In which Party — or Both.** — According to the author's understanding of the law, it is not necessary for the judge to become convinced in which party or whether in both was the impotence, or whether it was mutual between the two while both were otherwise capable.<sup>2</sup> But if the minuter finding should be deemed essential, it would not in most cases as practically presenting themselves be difficult. Thus, in one, Dr. Lushington observed: "Here are the very strongest grounds to presume the impotency of the man. If the parties lay together in one bed for so many years, of such ages, and the woman is certified to remain *virgo intacta*, there cannot be a stronger presumption that impotency existed, and that it was incurable."<sup>3</sup>

§ 1289. **Three Years.** — Where trial and time must thus be resorted to, the rule, derived from the canon law, and formerly deemed absolute and invariable in the ecclesiastical, is that the parties shall cohabit three years; at the end whereof, if the marriage remains unconsummated, impotence will be presumed.<sup>4</sup> And the libel was required to show on its face, either that there has been a triennial cohabitation, or that the defect is thus obvious to inspection, — in which latter case also, some particular

<sup>1</sup> Grimbaldeston v. Anderson, cited in Norton v. Seton, 3 Phillim. 147, 154, 1 Eng. Ec. 384, 385.

<sup>2</sup> Vol. I. § 779, 780, 792; ante, § 1284.

<sup>3</sup> Pollard v. Wybourn, 1 Hag. Ec. 725, 3 Eng. Ec. 308.

<sup>4</sup> Grimbaldeston v. Anderson, cited in Norton v. Seton, 3 Phillim. 147, 154, 1 Eng. Ec. 384, 385; Sparrow v. Harrison, 3 Curt. Ec. 16, 27, 7 Eng. Ec. 359; Welde v. Welde, 2 Lee, 578; Pollard v. Wybourn, 1 Hag. Ec. 725, 3 Eng. Ec. 308.

visible defect must be alleged, or the libel would not be admitted to proof.<sup>1</sup> Looking for the limitations and modifications of this doctrine, —

§ 1290. **Defect Obvious.** — Where the defect is obvious to inspection, and the parties are mature in years, this triennial cohabitation is unnecessary.<sup>2</sup> But —

§ 1291. **Below Eighteen.** — Says Swinburne: “Albeit he that hath accomplished the age of fourteen years at the time of the marriage be not then able to pay the debt which he oweth to his wife, yet by the received opinion, though some dissent, the matrimony is not therefore by and by to be adjudged void; but she is to expect until he have overreached the eighteenth year of his age, wherein *plena pubertas* is concluded. And if then also he be unable to pay his due, at the instance of the woman the marriage may be dissolved, unless the judge upon the consideration of the qualities of the persons shall grant a longer time.”<sup>3</sup>

§ 1292. **Continuity of Sleeping together.** — The three years’ rule does not require a sleeping together every night, *de die in diem*, during the entire period; general cohabitation is sufficient.<sup>4</sup> Nor in the ecclesiastical practice was it necessary for the libel to specify when, where, and how long in each place the parties cohabited, this being matter for the plea on the other side.<sup>5</sup> But when in one case it appeared that though the three years had elapsed, the parties had been necessarily separate a considerable part of the time, the court allowed a further period, and enjoined the complainant to return meanwhile to cohabitation.<sup>6</sup>

§ 1293. **Less than Three Years, with other Proofs.** — A case may present a double aspect. Without the aid of trial and time, impotence may appear probable, yet the proofs not be adequately conclusive. Then trial and time must make up the deficiency, but less than three years may suffice. Thus, in a wife’s suit before Lord Stowell, to a cohabitation of a little over two years was added the husband’s sworn answer, admitting his incapacity. Beyond which, the report of the examiners “stated, in substance,

<sup>1</sup> *Aleson v. Aleson*, 2 Lee, 576; *Lewis v. Lewis*, cited 2 Ib. 579.

<sup>2</sup> *Briggs v. Morgan*, 3 Phillim. 325, 1 Eng. Ec. 408; *Deane v. Aveling*, 1 Rob. Ec. 279. “Where the impotency doth sufficiently constare to be perpetual by the oaths aforesaid upon inspection, there

the triennial probation ceases.” *Godol. Abr.* 494.

<sup>3</sup> *Swinb. Spousals*, 49.

<sup>4</sup> *Welde v. Welde*, 2 Lee, 578; *Sparrow v. Harrison*, 3 Curt. Ec. 16.

<sup>5</sup> *Welde v. Welde*, *supra*.

<sup>6</sup> *Welde v. Welde*, 2 Lee, 578, 580, 586.

that though the disease and imperfection of the parts were not such as to imply impotence to the execution of their functions, yet that having heard his own accurate history of his alleged impotence, they put faith in his account, and as he was in good health they could hold out no hopes of its being remedied by any medical treatment." Thereupon this learned judge expressed himself fully satisfied with the proofs, and granted the decree prayed.<sup>1</sup> And for all cases having this double aspect, the present rule, however it may have been anciently, is that whenever the combined trial, time, and other proofs, whether the time of the trial is greater or less, create in the judicial understanding the needful assurance of incurable impotence, the relief will be granted.<sup>2</sup>

§ 1294. **Three Years alone.** — After the lapse of the three years, not before, the presumption of its own force works the result of nullity. "There is," said Sir J. P. Wilde, "a well-known and valuable rule, adopted of old time for the guidance of the court, that impotence shall be presumed after three years of ineffectual cohabitation, and shall not be presumed before."<sup>3</sup> In the case wherein these observations occur, there had been a cohabitation of nearly three years, and this learned judge suspended the decree to give the parties the opportunity to fill up the period. They did so, but "notwithstanding attempts on the part of the respondent," there was no consummation, and the nullity decree was granted.<sup>4</sup> This doctrine is still more aptly illustrated in —

§ 1295. **Another Case.** — After parties, as the report states, had "lived together in perfect happiness and contentment" fourteen years, fully performing, as both believed, the functions of the marriage bed, the woman having as she supposed three miscarriages, and the pair receiving medical advice to moderation, a rupture occurred from some other cause, whereupon she ascertained that the marriage had not been consummated. Bringing her nullity suit, she proved by medical testimony that she was a virgin, with a hymen, and apt. On the man's side, apparent

<sup>1</sup> *Greenstreet v. Cumyns*, 2 Phillim. 10, 1 Eng. Ec. 165. See *Merrill v. Merrill*, 126 Mass. 228.

<sup>2</sup> *N——r v. M——e*, 2 Rob. Ec. 625; s. c. nom. Anonymous, 22 Eng. L. & Eq. 637; s. c. nom. *A. v. B.* 1 Spinks, 12; *U——n v. F——s*, 2 Rob. Ec. 614; *S. v.*

*E.* 3 Swab. & T. 240, 245; *M. v. H.* 3 Swab. & T. 517, 521, 522; *F. v. D.* 4 Swab. & T. 86, 94; *G. v. G.* Law Rep. 2 P. & M. 287.

<sup>3</sup> *M. v. H.* 3 Swab. & T. 517, 522.

<sup>4</sup> *M. v. H.* 3 Swab. & T. 592.

capability was established. Upon this testimony the trial court, not duly advertg to the effect of triennial cohabitation, and assuming that the woman must affirmatively prove the fault to be as she alleged in the man, while in fact both were apparently capable, refused the decree prayed. But on appeal the House of Lords granted it. Said the Lord Chancellor, Chelmsford, after stating the three years' rule: "The cohabitation in the present case being for a much more lengthened period than is required to raise the presumption against the husband, the *onus* was thrown upon the respondent, either of disproving the facts, or of showing by clear and satisfactory evidence that the result was attributable to other causes than his own impotency."<sup>1</sup>

§ 1296. **Scotch Doctrine.** — In the modern Scotch law, the substance of the rule is preserved; but "there is no precise period fixed, during which the parties must cohabit before decree will be pronounced." Anciently the time was three years, as in the canon law.<sup>2</sup>

§ 1297. **Our American Books** — are silent on this question. But no reason appears why the English doctrine, which dates back to the earliest times, should not be deemed common law with us. It is reasonable, equitable, and promotive of justice where otherwise it might fail. Still, if accepted, it should be with the modifications which reason demands. And there may be further modifications to be derived by implication from particular statutes; as, in New York, where a statute of limitations compels the party proceeding on the ground of impotence to bring his suit within two years after the marriage.<sup>3</sup>

### V. *Inspection of the Person.*

§ 1298. **Doctrine Defined.** — Whenever the present condition of the sexual organs is an essential element in the proofs, the court orders what is termed an inspection of the person by medical experts. Acting under oath as *quasi* officers of the court,

<sup>1</sup> The various reports of this case at its different stages are, among others, L. v. H. 4 Swab. & T. 115; s. c. nom. X. v. Y. 34 Law J. n. s. Mat. 81; Lewis v. Hayward, 35 Law J. n. s. Mat. 105; L. v. H. Law Rep. 1 P. & M. 293. And see some discussions of this question in

the House of Lords, in the Scotch case of G. v. M. 10 Ap. Cas. 171.

<sup>2</sup> 1 Fras. Dom. Rel. 59; C. B. v. A. B. 12 Scotch Sess. Cas. 4th ser. H. L. 36; G. v. M. 10 Ap. Cas. 171.

<sup>3</sup> New York R. S. pt. 2, c. 8, § 33.

their duty is to examine the private parts of the parties, and report whether or not they are severally capable of marriage consummation, and whether or not the woman presents indications of having had connection with man.

§ 1299. **Comes from Necessity.** — This doctrine is a product of that supreme power to which all things, whether in the law or elsewhere, as of course yield, — necessity.<sup>1</sup> The parts concerned being concealed from public observation, if inspection could not be compelled, justice would in many instances fail. Therefore in England, Scotland, France, and probably every other country in which this impediment to marriage is acknowledged, the courts have required the parties, when the exigencies of the proofs demanded, to submit their persons to examination. The methods in some countries have involved needless exposure, but our tribunals employ only what is unavoidable, yet always so much. “It has been said,” observes Lord Stowell, “that the modes resorted to for proof on these occasions are offensive to natural modesty. But nature has provided no other means; and we must be under the necessity of saying that all relief is denied, or of applying the means within our power. The court must not sacrifice justice to notions of its own.”<sup>2</sup>

§ 1300. **Analogous** — to this proceeding is that in the common-law tribunals when, to suspend the execution of the death-sentence upon a woman, she claims to be with child. A jury of matrons is sworn to inspect her person, and report the result to the court.<sup>3</sup>

§ 1301. **With us,** — this practice has been adopted from the law of the ecclesiastical courts, and followed in New York,<sup>4</sup> in Vermont,<sup>5</sup> in Alabama,<sup>6</sup> in New Jersey,<sup>7</sup> and it would appear generally in our States.<sup>8</sup> It seems to have been rejected in Ohio.<sup>9</sup>

<sup>1</sup> Ante, § 298.

<sup>2</sup> *Briggs v. Morgan*, 3 Phillim. 325, 330, 1 Eng. Ec. 408, 410; 1 Fras. Dom. Rel. 60, 61; *Poynter Mar. & Div.* 135, note; *Devanbagh v. Devanbagh*, 5 Paige, 554, 557, 28 Am. D. 443.

<sup>3</sup> *Reg. v. Wycherley*, 8 Car. & P. 262; *S. v. Arden*, 1 Bay, 487, 489. As to which proceeding, see 1 Bishop Crim. Proced. § 1322-1324.

<sup>4</sup> *Devanbagh v. Devanbagh*, 5 Paige,

554, 556, 28 Am. D. 443. And see *Newell v. Newell*, 9 Paige, 25.

<sup>5</sup> *Le Barron v. Le Barron*, 35 Vt. 365.

<sup>6</sup> Anonymous, 35 Ala. 226.

<sup>7</sup> *Shafto v. Shafto*, 1 Stew. Ch. 34.

<sup>8</sup> **Quebec.** — It prevails in our neighboring province of Quebec. *Dorion v. Laurent*, 17 Lower Can. Jur. 324.

<sup>9</sup> All I am able to state as to Ohio is the following from the editor of the *Western Law Journal*. He says: “I



§ 1302. **Limits of Doctrine.** — This right, like every other in our unwritten law of reason, is simply commensurate with its foundation principle, not broader. Where the necessity for it ends, it ceases. Thus, —

§ 1303. **Already inspected.** — If there had been an inspection before the bringing of the suit, and it was by competent experts and sufficiently full, their testimony will be taken and nothing further will ordinarily be required.<sup>1</sup> But where the difficulty disclosed to the court was of a sort to render necessary a surgical examination of the woman's person in connection with interrogatories for her to answer on oath as to the commencement and progress of the disease creating it, inspection was ordered, though she had been previously examined *ex parte*, and without oath, by her own medical attendants.<sup>2</sup> Again, —

§ 1304. **Necessity to appear.** — The court will not direct an inspection until in the progress of the cause its necessity is disclosed.<sup>3</sup> Even where certainly it would be required at the hearing, the Ecclesiastical Court deferred the admission of the husband's libel, and gave the wife an opportunity to reply by affidavits; upon which, it appearing highly improbable the suit could succeed, the proceeding was dismissed.<sup>4</sup> Still again, —

§ 1305. **Enforcing Inspection Decree.** — There is no one exclusive method of compelling an unwilling party to submit to inspection. Doubtless an attachment for contempt is always competent,<sup>5</sup> but in some circumstances the court has the election of a milder way. Where a man to avoid compliance left the country, the court, finding the other evidence sufficient, dispensed with this. The other evidence consisted of a medical certificate made twelve years after marriage that the woman was *virgo intacta* and *apta viro*, and of two several confessions by him to medical witnesses of his incapacity, coupled with proof

have been counsel in a case where the wife complained of impotence in the husband. There being no other mode of proof, application was made to the Supreme Court on the circuit for an order of inspection. The question was reserved to the court in bank, who decided that they had no power to grant the order, and the petition was dismissed on account of the impossibility of proof." 2 West. Law Jour. 131.

<sup>1</sup> Brown v. Brown, 1 Hag. Ec. 523, 3

Eng. Ec. 229; Devanbagh v. Devanbagh, 5 Paige, 554, 557, 28 Am. D. 443. See Harrison v. Harrison, 4 Moore, P. C. 96; Anonymous, 35 Ala. 226, 228, 229.

<sup>2</sup> Newell v. Newell, 9 Paige, 25.

<sup>3</sup> Anonymous, Deane & S. 295, 333.

<sup>4</sup> Briggs v. Morgan, 2 Hag. Con. 324; s. c. 2 Phillim. 325, 1 Eng. Ec. 408. And see Aleson v. Aleson, 2 Lee, 576.

<sup>5</sup> Post, § 1319. Compare with ante, § 1091, 1092.

that the woman's health<sup>1</sup> had suffered.<sup>2</sup> Where the defending woman was abroad, and inspection alone could complete the proofs, the court permitted the cause to stand over "with the view of having the respondent examined if she should come to this country, as such an examination alone can satisfy the court that a decree ought to be pronounced."<sup>3</sup> In another case, it not appearing whether or not an examination was indispensable, the judge ordered an application which had been made for an attachment to lie over until the hearing, when, the nature of the evidence being seen, it would be proceeded in or not as necessity might require. "But," he added, "if the respondent attempts to leave the jurisdiction, it shall be granted at once."<sup>4</sup> The alimony of a wife not in the country may be suspended to induce her submission.<sup>5</sup> We have a query whether or not an absent party's evidence may be suppressed until he will submit to inspection.<sup>6</sup>

§ 1306. **Inspection of Complaining Woman.**—Where the woman is plaintiff, and the libel represents her to have been a spinster at the marriage, an inspection of her person, as well as of the man's, is usual; because her virginity and capacity imply his incapacity.<sup>7</sup> Dr. Lushington once said that the court always requires a medical certificate of the woman's condition;<sup>8</sup> but we should render his meaning as limited to cases like the one he was speaking to,<sup>9</sup> and those under the three years' rule;<sup>10</sup> since in others the complaining woman seems not to have been inspected.<sup>11</sup> True, as said in an old case, "the virginity of the woman is very material,"<sup>12</sup> but it would be palpably absurd to look for it in a widow or in any other woman who did not claim to be a virgin.<sup>13</sup>

<sup>1</sup> Post, § 1320.

<sup>2</sup> Pollard v. Wybourn, 1 Hag. Ec. 725,

3 Eng. Ec. 308; Coote Ec. Pract. 368.

<sup>3</sup> T. v. M. Law Rep. 1 P. & M. 31, 35.

<sup>4</sup> B. v. L. Law Rep. 1 P. & M. 639.

<sup>5</sup> Newell v. Newell, 9 Paige, 25.

<sup>6</sup> Anonymous, 35 Ala. 226, 228. In connection with this, see ante, § 1095.

<sup>7</sup> Coote Ec. Pract. 367.

<sup>8</sup> Pollard v. Wybourn, 1 Hag. Ec. 725, 3 Eng. Ec. 308.

<sup>9</sup> Vol. I. § 111.

<sup>10</sup> Ante, § 1287, 1289, 1293-1295.

<sup>11</sup> See Greenstreet v. Cumyns, 3 Phillim.

10, 1 Eng. Ec. 165. And see Norton v. Seton, 3 Phillim. 147, 158, 1 Eng. Ec. 384, 386; Harrison v. Sparrow, 3 Curt. Ec. 1, 7 Eng. Ec. 357; s. c. nom. Harrison v. Harrison, 4 Moore, P. C. 96. The English Divorce Court holds fast to the doctrine of inspection, possibly giving it a more universal application than is accorded it in these sections. H. v. C. 1 Swab. & T. 605.

<sup>12</sup> Grimbaldeston v. Anderson, cited 3 Phillim. 155, 1 Eng. Ec. 385.

<sup>13</sup> And see post, § 1311.

§ 1307. **Who and how many the Inspectors.**—The selection of the inspectors and their number appear to be wholly within the judicial discretion. Commonly in modern times the ecclesiastical courts appointed three medical men,—either two physicians and a surgeon, or two surgeons and a physician,—nominated by the promoter, the adverse party having the privilege of naming, if he chose, one or more of them.<sup>1</sup> Earlier this office seems to have been performed, as to the woman, in whole or in part by matrons and midwives.<sup>2</sup> The reason for appointing three apparently was to have more than the two witnesses required by the ecclesiastical rules to each specific fact.<sup>3</sup> Where, with us, only one witness to a fact is essential, two inspectors will, in principle, suffice; and in the English Divorce Court, where the rule of two witnesses does not prevail, the common number is two,<sup>4</sup> though there are early instances of three.<sup>5</sup>

§ 1308. **Sworn—(Form of Oath).**—The inspectors are sworn.<sup>6</sup> A form of the oath, extracted from a book of English practice is:—

You are produced as inspectors in a cause, &c. You respectively swear that you will faithfully and to the best of your skill inspect the parts and organs of generation of each of them the said A and B, and make a just and true report in writing to the judge ordinary of this court whether the said A is capable of performing the act of generation, and if incapable, whether such his incapacity can be cured by art or skill; and also, whether the said B is or is not a virgin, and whether she hath or hath not any impediment on her part to prevent the consummation of the marriage, and that one of you will deliver such report under your hands and seals, closely sealed up, to one of the registrars of her Majesty's court of probate.<sup>7</sup>

§ 1309. **Certificate.**—The certificate of the inspectors, according to the invariable practice in England, does not give reasons. “I should be extremely reluctant,” said Dr. Lushington, “to depart from that practice. In the first place, it is a received maxim, *Cuilibet in arte sua credendum est*. Secondly, if the grounds were given, how could the court comprehend the reasons, and decide

<sup>1</sup> Coote Ec. Pract. 388; *Deane v. Ave-ling*, 1 Rob. Ec. 279, where the proceedings appear in full.

<sup>2</sup> *Essex v. Essex*, 2 How. St. Tr. 786, and Vol. I. § 780; Ayl. Parer. 228. In *Welde v. Welde*, 2 Lee, 580, the wife, who was libellant, was inspected by midwives, and the defendant by surgeons.

<sup>3</sup> See ante, § 456, 768, 773.

<sup>4</sup> *Browne Div. Pract.* 623; *S. v. E. 3 Swab. & T.* 240; *M. v. H. 3 Swab. & T.* 517; *M. v. B. 3 Swab. & T.* 550; *F. v. D. 4 Swab. & T.* 86; *L. v. H. 4 Swab. & T.* 115.

<sup>5</sup> *W. v. H. 2 Swab. & T.* 240.

<sup>6</sup> Coote Ec. Pract. 389.

<sup>7</sup> *Browne Div. Pract.* 4th ed. 622, 623; *Brown & P. Div.* 634.

between conflicting opinions? Besides, the introduction of the grounds would lead the court into minute inquiries about matters the decision of which the court would be most anxious to avoid, unless it were imperatively called to pursue the investigation.”<sup>1</sup> But,—

§ 1310. **Examining Inspectors as Witnesses.**—Where the case requires, or for any reason it appears to, the judge desirable, the inspectors may be examined as witnesses,—not to the exclusion of the certificate, but in connection with it.<sup>2</sup>

§ 1311. **Effect of Certificate**—(**Other Evidence combining**).—The certificate has no technical effect, being mere evidence like any other, to be weighed with the rest. Sir John Nicholl once said that even as collateral it is taken with caution; he was aware of no case in which it had been admitted as sufficient alone.<sup>3</sup> Yet there is at least one<sup>4</sup> in which it was certainly the leading proof; and no legal reason appears for withholding from it, when admissible, full credit to the extent of its relevant terms. The parties may produce other witnesses than the inspectors to the facts covered by the certificate; and if, for example, the evidences of virginity in the woman have been destroyed, the case may proceed to a hearing without inspection.<sup>5</sup>

§ 1312. **American Practice.**—It is perceived that the foregoing expositions are chiefly English, compelled by the paucity of American authority. And still with us the course will not be uniform in our States, or identical in the courts of law and those of equity. Two illustrations will suffice; thus,—

§ 1313. **In Equity on Pro Confesso.**—On a husband’s bill being taken for confessed, Chancellor Walworth gave the following directions: “There must be a reference to a master to take proof of the facts and circumstances stated in the complainant’s bill; and particularly the master must inquire and report whether the defendant, at the time of the solemnization of the marriage with the complainant, was physically incapable of entering into the marriage state, and whether she is still *virgo intacta*, and inca-

<sup>1</sup> Pollard v. Wybourn, 1 Hag. Ec. 725, 3 Eng. Ec. 308. In Deane v. Aveling, 1 Rob. Ec. 279, 284, is the form of certificate, with some of the other proceedings.

<sup>2</sup> Deane v. Aveling, 1 Rob. Ec. 279; W. v. H. 2 Swab. & T. 240

<sup>3</sup> Norton v. Seton, 3 Phillim. 147, 1

Eng. Ec. 384, 387; Rogers Ec. Law, 2d ed. 641.

<sup>4</sup> Pollard v. Wybourn, 1 Hag. Ec. 725, 3 Eng. Ec. 308. See also Greenstreet v. Cumyns, 2 Phillim. 10, 1 Eng. Ec. 165.

<sup>5</sup> Serrell v. Serrell, 2 Swab. & T. 422.

pable of consummating the marriage contract, by reason of her own incurable impotence. The order of reference must also direct that the master examine the defendant on oath as to the several matters alleged in the bill, and that the defendant submit herself to such surgical examinations, and examinations by matrons, as the master may think proper to direct, for the purpose of ascertaining the fact of the alleged impotence; but that no person shall be present at such examinations, except the surgeons and matrons who may be selected by the master for that purpose, unless with her consent; and that in the selection of surgeons and matrons for that purpose, the master have a due regard to the feelings and wishes of the defendant. The master is also to be directed to return the proofs taken before him, in a schedule to his report. No person is permitted to be present before the master, on the reference, except the parties and their counsel and witnesses, and such friends of either of the parties as they or either of them may request to attend the reference. And the complainant, under the direction of the master, must furnish the necessary funds to pay the expenses of the surgical examinations of the defendant, if a sufficient and satisfactory examination has not already been made.”<sup>1</sup>

§ 1314. **Not of Equity.** — In a carefully considered Vermont case, the order was, “that a commissioner be appointed to take the proofs in relation to the alleged incurable impotence of the defendant, at the time of the said marriage between him and the petitioner. And it is also ordered that the defendant submit himself to a personal examination by such physicians and surgeons, at such time and place, and under such regulations, as shall be selected and prescribed by the said commissioner, for the purpose of determining the truth of the said allegation in said petition. The commissioner will select such number of competent and disinterested physicians and surgeons, and prescribe such rules and regulations in relation to such examination, as to secure the utmost fairness of such examination, and will report all his proceedings in relation thereto, with the evidence of all such medical examiners as to the facts and results of said examination, and return the same, together with the other proofs taken by him, to the court.”<sup>2</sup>

<sup>1</sup> *Devanbagh v. Devanbagh*, 5 Paige, 554, 558, 28 Am. D. 443. For the termination of this suit, see 6 Paige, 175.

<sup>2</sup> *Le Barron v. Le Barron*, 35 Vt. 365, 372.

§ 1315. **No Reference.**—Gentlemen acquainted with our varying American practice will discern that not in every State and before every court will there be any reference to a master or commissioner. The judge will often or commonly himself hear the evidence and decide thereon,—a practice which duly recognizes the delicacy and importance of this sort of cause.

## VI. *Other Questions of Evidence.*

§ 1316. **The Burden of Proof**—is with the party alleging the impotence<sup>1</sup> to establish its existence at the marriage, and its incurable<sup>2</sup> nature or condition.<sup>3</sup> Still,—

§ 1317. **Presumptions.**—When a present incapacity is shown, if it is natural, it will be presumed to have been in existence at the marriage; if accidental, the contrary presumption seems to arise.<sup>4</sup> So that when either capacity is probable or a former incapacity has been removed, there can be no nullity sentence.<sup>5</sup>

§ 1318. **How much Proof.**—The ordinary requirements in divorce cases<sup>6</sup> apply to this one; with a tendency to greater strictness in this, because of the graver consequences of the sentence.<sup>7</sup> Thus,—

§ 1319. **Illustrations of Evidence.**—The last two sub-titles supply various illustrations. The following also may be helpful. In a wife's suit, the husband refused to be inspected, and the court pronounced him in contempt. Then he consented, and his offer was declined. The certificate of the wife's condition was in effect "that there were no positive proofs of connection having taken place, or the contrary; but that there were decidedly no physical impediments to sexual intercourse." There was some collateral evidence; added to which the husband had admitted non-consummation, yet denying his inability. The parties had cohabited seven years. The court, being satisfied that there was no collusion, gave sentence of nullity.<sup>8</sup> In another suit by the

<sup>1</sup> Cuno v. Cuno, Law Rep. 2 H. L. Sc. 300.

<sup>2</sup> Ante, § 1281.

<sup>3</sup> Ante, § 761; Brown v. Brown, 1 Hag. Ec. 523, 3 Eng. Ec. 229; Newell v. Newell, 9 Paige, 25; Devanbagh v. Devanbagh, 5 Paige, 554, 28 Am. D. 443; Welde v. Welde, 2 Lee, 578, 580; Lorenz v. Lorenz, 93 Ill. 376.

<sup>4</sup> Godol. Abr. 494; Sanchez. lib. 7, disp. 103, n. 4; Shelf. Mar. & Div. 204.

<sup>5</sup> Welde v. Welde, 2 Lee, 578, 580, 586; Devanbagh v. Devanbagh, 6 Paige, 175; 1 Fras. Dom. Rel. 55.

<sup>6</sup> Ante, § 762, 763.

<sup>7</sup> Ante, § 797.

<sup>8</sup> Harrison v. Sparrow, 3 Curt. Ec. 1, 16, 7 Eng. Ec. 357, 359; s. c. nom. Har-

wife, there had been a cohabitation of only three months. The case being under the ecclesiastical practice, the husband answered<sup>1</sup> the libel, and the wife "and other witnesses" were examined. Yet it does not appear from the report what this evidence was. The inspectors certified in effect as to the wife, that neither were there any certain signs of virginity, nor was there evidence of perfect consummation having taken place. As to the husband, "We find no anatomical malformation, but from oral information obtained during a somewhat lengthened interview, we are decidedly of the opinion that there is some physiological defect which has prevented him from completing the act of copulation. As we cannot discover any special cause to which a remedy can be applied, we fear this defect will be permanent." Dr. Lushington, saying that he wished there had been a more distinct showing of injury past and prospective to the woman's health, still "could not think of sending the lady back to renew cohabitation," therefore pronounced the nullity decree.<sup>2</sup> In an Ohio case, there was the concurring testimony of three respectable men that they examined the defendant and found him destitute, in particulars pointed out, of the members or qualifications of a man. The divorce was granted.<sup>3</sup>

§ 1320. **Health suffering.** — Not unfrequently in these cases, as in one of those just stated, we find some mention of ill-health produced in the capable person by cohabiting with the impotent.<sup>4</sup> This is matter belonging rather to medical jurisprudence than to pure law. But as this consideration enters into large numbers of the cases, it should be here observed that the constant excitement created in the nervous system of a capable person, when required to spend the hours of the night for a long period in bed with an incapable one of the opposite sex, is understood to be injurious to the health, to a degree differing with the diverse peculiarities of individuals, and with various other things; and, as a rule, more injurious to a woman than to a man. A single reference to some cases wherein this appears from medical and other testimony will suffice.<sup>5</sup>

*risson v Harrison*, affirmed by the Privy Council, 4 Moore, P. C. 96, 103.

<sup>1</sup> Ante, § 452.

<sup>2</sup> *G—s v. T—e*, 1 Spinks, 389.

<sup>3</sup> *Keith v. Keith*, Wright, 518.

<sup>4</sup> See also Vol. I § 1590, 1830.

<sup>5</sup> *S. v. E.* 3 Swab. & T. 240, 244; *F. v. D.* 4 Swab. & T. 86; *Pollard v. Wybourn*, 1 Hag. Ec. 725, 3 Eng. Ec. 308. To quote from Dr. Lushington: "In some cases, especially where the defect is on the husband's side, continued cohabitation would

§ 1321. *The Doctrine of this Chapter restated.*

Though a case of impotence involves inquiries which would be indecent if they were not essential to justice, still the demands of justice cannot be disregarded. Therefore the complaint must, as in other litigation, so set out the fact relied on as to disclose a *prima facie* case, and the proofs, in spite of what would be their obscenity if there were no occasion for them, must fully and distinctly establish the fact averred. The proceeding termed the inspection of the person would not be tolerated were it not necessary, being an invasion of what otherwise would be sacred both in mind and body. Therefore it can be compelled, not as of course in every case, but only where it cannot well be dispensed with. The party setting up the defect has the burden of proving it and its incurability.

be destructive to the health and comfort of one of the parties. There was one such case a few years since of a very distress- ing character." Anonymous, Deane & S. 295, 299.



## CHAPTER XLII.

## ADULTERY.

- § 1322, 1323. Introduction.  
 1324-1348. How the Allegation.  
 1349-1365. In General of the Evidence.  
 1366-1397. Particular Facts in Evidence.  
 1398-1426. Supplemental Questions of Evidence.  
 1427. Doctrine of Chapter restated.

§ 1322. **Elsewhere.** — In the first volume, in a chapter much shorter than the present one, the compact and comparatively brief law of this matrimonial offence is stated.<sup>1</sup> The intricate part is the evidence, the chief matter for explanation here.

§ 1323. **How Chapter divided.** — We shall consider, I. How the Allegation; II. In General of the Evidence; III. Particular Facts in Evidence; IV. Supplemental Questions of Evidence.

I. *How the Allegation.*

§ 1324. **The Marriage** — must be alleged and proved, but that is explained in other chapters.<sup>2</sup> Added to which, to complete the complainant's *prima facie* case, —

§ 1325. **The Act of Adultery** — must be duly shown. The allegation should state positively, not from information and belief,<sup>3</sup> or otherwise in uncertain terms, that, at a time and place specified, the defendant committed the carnal act with a person named;<sup>4</sup> unless something of this particularity is unknown, when the want of knowledge may be averred as a substitute therefor.

<sup>1</sup> Vol. I. § 1493-1523.

<sup>2</sup> Ante, § 604-611, 731-758.

<sup>3</sup> *Spilsbury v. Spilsbury*, 3 Swab. & T. 210. But see *Marsh v. Marsh*, 1 C. E. Green, 391, 84 Am. D. 164.

<sup>4</sup> *Trubee v. Trubee*, 41 Conn. 36; *Black v. Black*, 12 C. E. Green, 664; *Freeman v. Freeman*, 31 Wis. 235; *Freeman v. Freeman*, 39 Minn. 370; *Scheffling v. Scheffling*, 17 Stew. Ch. 438.

§ 1326. **Ecclesiastical Forms.** — Striking out the redundancy from an ecclesiastical libel, as done in the last chapter,<sup>1</sup> we find in three of its eighteen articles positive averments of adultery, severally as follows: —

That on some occasions of their being so alone together as aforesaid, they the said Arthur Vincent and Maria Theresa Grant had the carnal use and knowledge of each other's bodies, and thereby committed the foul crime of adultery. — That the said Arthur Vincent and the said Maria Theresa Grant, whilst so alone together on that day, had the carnal use and knowledge of each other's bodies, and thereby committed the crime of adultery. — That on the said night the said Arthur Vincent and the said Maria Theresa Grant were alone, naked together in one and the same bed, and committed adultery.<sup>2</sup>

§ 1327. **Form in Divorce Court.** — The form established by the judges for the Divorce Court of England is given in an earlier chapter.<sup>3</sup>

§ 1328. **With us** — the forms more or less differ, but they are generally and properly simple; as, for example, the allegation may be, —

That on, &c. at, &c. the defendant committed adultery with one B. Or, —

That on, &c. at, &c. the defendant had carnal knowledge of the body of one B, committing thereby with the said B the crime of adultery.

§ 1329. **Particulars Unknown.** — The variations required where particulars are unknown will be shown as we proceed.

§ 1330. **"Committed Adultery"** — **"Had Carnal Knowledge."** — In the present English form,<sup>4</sup> the allegation is simply that the defendant "committed adultery" with the third person. And this is the expression mostly in use in divorce causes with us. It has been adjudged sufficient.<sup>5</sup> The indictment for adultery oftener runs "had carnal knowledge of the body," &c.; but in some of our States "committed adultery" has been adjudged adequate, and we have no affirmative knowledge that it would be rejected in the others.<sup>6</sup> Should we deem it not good in the indictment, the conclusion would not be inevitably against it in the civil action for divorce.

§ 1331. **"Living in Adultery."** — To charge, with due averments of time and place, a living in open and notorious adultery with the *particeps criminis* is legally sufficient;<sup>7</sup> because the greater

<sup>1</sup> Ante, § 1279.

<sup>2</sup> Coote Ec. Pract. 323, 325, 327.

<sup>3</sup> Ante, § 576. And see Browning Div. Pract. 136; Law Rep. 1 P. & M. 763.

<sup>4</sup> Ante, § 576.

<sup>5</sup> Hawes v. Hawes, 33 Ill. 286.

<sup>6</sup> Bishop Stat. Crimes, § 673, 674.

<sup>7</sup> Bishop Stat. Crimes, § 697, 698.

includes the less. But practically this form is objectionable as requiring needless proof to avoid a variance.<sup>1</sup> In one or more of our States, a living in adultery is by the statutes essential to the divorce. Then it must be alleged in the statutory terms.<sup>2</sup> So —

§ 1332. "**Common Prostitute.**" — We have a *dictum*, doubtless correct, that the carnal act is sufficiently charged by the term "common prostitute." But the proofs must cover the whole of the unnecessarily broad meaning.<sup>3</sup>

§ 1333. **Name of Particeps Criminis** — (**Known — Unknown**). — It is evident that the name of the person with whom the adultery was committed is the very gist of the description thereof. Still there are judges who object to requiring it, on the ground of scandal and injury to a person not a party to the suit.<sup>4</sup> The same objection would compel the suppression of the name in the testimony, and therewith all facts from which it might be inferred. The answer to which is that, in the words of Dr. Lushington, "justice must be done to suitors, so that it is impossible to exclude matter which ought to be admitted in evidence because incidentally it may affect the character and involve the conduct of those who are not parties to the suit."<sup>5</sup> And the rule has become established that the libellant must allege the name if he knows it; if not, he must so state. Adequate words are "committed adultery with a person (or with some person) whose name is to your libellant unknown."<sup>6</sup> But —

§ 1334. **Further of Name Unknown.** — An averment that a thing is unknown will not relieve the pleader from the duty to impart reasonable information.<sup>7</sup> Therefore the form of allegation just stated, to be adequate, must, at least by some opinions, be accompanied by such further description of time, place, circumstances, and the like, as will apprise the defendant of the particu-

<sup>1</sup> *Marble v. Marble*, 36 Mich. 386.

<sup>2</sup> *Morris v. Morris*, 75 N. C. 168.

<sup>3</sup> *Dismukes v. Dismukes*, 1 Tenn. Ch. 266.

<sup>4</sup> *Farr v. Farr*, 34 Missis. 597, 601, 69 Am. D. 406.

<sup>5</sup> *Croft v. Croft*, 3 Hag. Ec. 310, 320, 5 Eng. Ec. 120, 125.

<sup>6</sup> *Germond v. Germond*, 6 Johns. Ch. 347, 10 Am. D. 335; *Wood v. Wood*, 2 Paige, 108; *Garrat v. Garrat*, 4 Yeates, 244; *Church v. Church*, 3 Mass. 157,

*Choate v. Choate*, 3 Mass. 391; *Dunlap v. Dunlap*, Wright, 210; *Richards v. Richards*, Wright, 302; *Sanders v. Sanders*, 25 Vt. 713; *Mansfield v. Mansfield*, Wright, 284; *Bird v. Bird*, Wright, 98; *Morrell v. Morrell*, 1 Barb. 318; *Trubee v. Trubee*, 41 Conn. 36; *Black v. Black*, 12 C. E. Green, 664; *Mitchell v. Mitchell*, 61 N. Y. 398.

<sup>7</sup> 1 Bishop Crim. Proced. § 495, 498, 547; *Cardwell v. Cardwell*, 12 Hun, 92.

lar transaction.<sup>1</sup> On this principle, it was adjudged in New York insufficient to say that "the defendant, since the marriage, viz., in the month of November, 1851, committed adultery with a female in the city of New York, whose name is unknown to the plaintiff, and the particular circumstances whereof are unknown to the plaintiff, but which she expects to be able to prove at the trial of this cause." For "if," observed Sandford, J., "the party have information sufficient to warrant the belief that the offence has been committed, or the expectation that it can be proved on the trial, that information must extend at least to the particular place or locality where it occurred, though the name of the person with whom may be unknown."<sup>2</sup> And if a libel charges one adultery thus and another well, yet the proof of the latter fails, there can be no divorce.<sup>3</sup> These cases go the full length of the law in compelling minuteness of description. An indictment need not descend further into particulars,<sup>4</sup> hence plainly a libel for divorce need not.

§ 1335. **Proof of Unknown.** — When the name of the *particeps criminis* is thus alleged to be unknown, the proof must show that so it was in fact.<sup>5</sup> And when the name is given in the pleading, proof of an unknown person will not suffice.<sup>6</sup>

§ 1336. **The Time and Place** — must in most of our States be set out.<sup>7</sup> But there are differences as to how minutely. In none are the strict common-law rules for indictments applied to the divorce libel. But probably in all, the following, unless saved by a bill of particulars, would be rejected, as it was in Mississippi: that the defendant, Charles K. Farr, "at various times and upon various occasions since his marriage with complainant has proven unfaithful to his marriage vow; in this, that the said Charles K.

<sup>1</sup> Mills v. Mills, 3 C. E. Green, 444; Miller v. Miller, 5 C. E. Green, 216; Tim v. Tim, 47 How. Pr. 253, 16 Abb. Pr. n. s. 39. And see ante, § 597-599.

<sup>2</sup> Heyde v. Heyde, 4 Sandf. 692, 693. For observations on this case, see Mitchell v. Mitchell, 61 N. Y. 398, 408, 409. And see Shoemaker v. Shoemaker, 20 Mich. 222.

<sup>3</sup> Miller v. Miller, 5 C. E. Green, 216.

<sup>4</sup> 1 Bishop Crim. Proced. § 493-498, 545-553, 676-682.

<sup>5</sup> Ib. § 549-552; Miller v. Miller, supra.

<sup>6</sup> Bokel v. Bokel, 3 Edw. Ch. 376.

<sup>7</sup> Ante, § 1325; Clutch v. Clutch, Sax-

ton, 474; Morrell v. Morrell, 1 Barb. 318; Christianberry v. Christianberry, 3 Blackf. 202, 25 Am. D. 96; Church v. Church, 3 Mass. 157; Kane v. Kane, 3 Edw. Ch. 389; Burr v. Burr, 2 Edw. Ch. 448; Hare v. Hare, 10 Tex. 355; Wright v. Wright, 6 Tex. 3; Porter v. Porter 3 Swab. & T. 596; Wood v. Wood, 2 Paige, 108; Dunn v. Dunn, 11 Mich. 284; Shoemaker v. Shoemaker, 20 Mich. 222; Pramagiori v. Pramagiori, 7 Rob. N. Y. 302; Strong v. Strong, 3 Rob. N. Y. 719; Marsh v. Marsh, 1 C. E. Green, 391, 84 Am. D. 164; Trubee v. Trubee, 41 Conn. 36.

Farr has been guilty of adultery with a servant-woman of complainant, and with other females, in utter disregard of his duties as husband." It was well observed by Fisher, J., "that the charge must be made with reference to some particular time and place," and not "put in issue the defendant's course of conduct during the whole time of the matrimonial connection."<sup>1</sup> In a New York case, the allegation, omitting matter not proved, was that "at divers times between the first day of May, 1869, and the commencement of this action, and at divers places in the city of Elmira, but at what particular times and places plaintiff is unable more particularly to state, said defendant has committed adultery with . . . men whose names are unknown to plaintiff." Thereupon it was at the hearing found that "in the month of June, 1869, on or about the twenty-sixth day thereof, at the city of Elmira, in a vacant lot on the lower end of John Street, the defendant herein committed adultery with a man known by the name of and usually called Bill Langford." And a judgment thereon for divorce was sustained.<sup>2</sup> Now, —

§ 1337. **The Rule** — for all this, as well said by Chancellor Walworth, "is to require the charge, whether of crimination or recrimination, to be stated in the pleadings and in the issues in such a manner that the adverse party may be prepared to meet it on the trial."<sup>3</sup> But the methods for accomplishing this object differ. Thus, —

§ 1338. **Bill of Particulars** — (**Charge General**). — If, after the bringing of a libel in terms however general, the libellant follows it with a bill of the particulars,<sup>4</sup> giving to the respondent seasonable notice of whatever he has occasion to know, the latter's rights are as well secured as if the original allegation had contained all. Within this principle, the practice in some of our States permits the omission of time and place from the libel, but on motion or otherwise the court will order a bill of the particulars.<sup>5</sup> Thus, in Massachusetts, where a "libel for a divorce," to

<sup>1</sup> *Farr v. Farr*, 34 Missis. 597, 600, 601, 69 Am. D. 406.

<sup>2</sup> *Mitchell v. Mitchell*, 61 N. Y. 398. Compare with *Marsh v. Marsh*, supra; *Dismukes v. Dismukes*, 1 Tenn. Ch. 266; *Conant v. Conant*, 10 Cal. 249, 70 Am. D. 717; *Goodwin v. Goodwin*, 8 C. E. Green, 210; *Noel v. Noel*, 9 C. E. Green, 137;

*Black v. Black*, 11 C. E. Green, 431, 12 Ib. 664; *Cardwell v. Cardwell*, 12 Hun, 92.

<sup>3</sup> *Wood v. Wood*, 2 Paige, 108, 113. And see *Kane v. Kane*, 3 Edw. Ch. 389; *Trubee v. Trubee*, 41 Conn. 36.

<sup>4</sup> Ante, § 670.

<sup>5</sup> *Realf v. Realf*, 77 Pa. 31; *Hawes v. Hawes*, 33 Ill. 286; *Mitchell v. Mitchell*,

quote from the report, "charged various acts of adultery, committed at divers times with persons unknown, for a period of eight years," the court, declining to quash it, ordered a bill of the particulars, to the allegations whereof the proofs would be limited at the hearing.<sup>1</sup> In the practice of the English Divorce Court, bills of the particulars of the adultery are sometimes ordered;<sup>2</sup> but they will not supply the defect of a mere general allegation.<sup>3</sup> Again,—

§ 1339. **Waiver by Pleading.** — If the defendant is really informed sufficiently by an allegation which on general principles is too indefinite, and does not object, plainly there is no one else to complain. On this principle it was held in Alabama that if one answers a too indefinite bill for divorce, without taking the objection, he waives it, and he cannot bring it forward afterward.<sup>4</sup> But in New York, where it was alleged "that the said defendant hath in numerous instances, both before and since their separation, committed adultery in this State and elsewhere," the late Chancellor Kent refused to send the case to a jury to try the issue, though the defendant had answered denying the allegation, and the plaintiff had filed his replication, — yet he suffered the bill to be amended on terms.<sup>5</sup> Thus, in this section and the last, we have the principle, and the fact that the courts differ in its application.

§ 1340. **Variance as to Place.** — Must the place of the adultery, when duly stated in the libel or bill of particulars, be proved as laid? In the criminal law, a variance of this sort is immaterial, unless it shows the offence to have been committed without the jurisdiction of the court.<sup>6</sup> And the divorce law is believed to be the same, while yet in both the court will protect the party from injury by surprise. Thus, in a divorce case, the adultery having been alleged as committed out of the State, and the proof showing it to have been within the State, the variance was held to be of no avail to the defendant when he suffered no harm

61 N. Y. 398, 414; *Garrat v. Garrat*, 4 Yeates, 244, 250. And see *Hancock's Appeal*, 64 Pa. 470.

<sup>1</sup> *Adams v. Adams*, 16 Pick. 254. And see *Harrington v. Harrington*, 107 Mass. 329.

<sup>2</sup> *Codrington v. Codrington*, 4 Swab. & T. 63, 3 Swab. & T. 368; *Hunt v. Hunt*, 2 Swab. & T. 574.

<sup>3</sup> *Porter v. Porter*, 3 Swab. & T. 596.

<sup>4</sup> *Holston v. Holston*, 23 Ala. 777.

<sup>5</sup> *Codd v. Codd*, 2 Johns. Ch. 224. And see *Wood v. Wood*, 2 Paige, 108; *Morrell v. Morrell*, 1 Barb. 318; *Burr v. Burr*, 2 Edw. Ch. 448.

<sup>6</sup> 1 Bishop Crim. Proced. § 370, 371, 375.

therefrom.<sup>1</sup> Still, there are other cases more or less tending to the conclusion that the proof of the place must correspond to the allegation of it.<sup>2</sup> Let us compare this allegation with that of —

§ 1341. **Time.** — In the criminal law, to a precision not required in our civil practice, the offence must under the unwritten rule be charged as of an exact day. But the proofs need only bring it within the statute of limitations.<sup>3</sup> In divorce law, the exact day of an adultery need not be alleged; it suffices, for example, to state the month and year, while only surprise is to be avoided in the proofs.<sup>4</sup> Now, —

§ 1342. **Further of Time and Place.** — We have thus arrived at the common rule for civil causes, including divorce,<sup>5</sup> that time and place, “when not descriptive of the identity of the subject of the action, will be found immaterial, and need not be proved strictly as alleged.”<sup>6</sup> The reason for all appears to be that one should impart in allegation the most exact information practicable, yet should not be prejudiced at the hearing if his just endeavor was not wholly successful, unless injury has resulted to the opposing party. If in fact there is a harmful surprise to the latter, he will be entitled to a continuance to meet the unexpected evidence. This is termed proving the substance of the issue. We shall see, further on,<sup>7</sup> that the court or jury passing on the issue of adultery need not be satisfied of its commission at any particular time and place, but it suffices for them to be convinced of its occurrence at some time and place. And this proposition, by its very terms, includes the other; namely, that proof of it at other times and places than those alleged will fulfil the requirements of the law. But —

§ 1343. **The Person** — is different. “A libel alleging that the respondent committed adultery with a particular person is not sustained by proof of adultery with any other person.”<sup>8</sup> For the accusation must identify the transaction.<sup>9</sup> And adultery with

<sup>1</sup> *Washburn v. Washburn*, 8 Mass. 131.

<sup>2</sup> *Prince v. Prince*, 10 C. E. Green, 310, *Adams v. Adams*, 20 N. H. 299, 301. And see further on this point, *Germond v. Germond*, 6 Johns. Ch. 347, 10 Am. D. 335.

<sup>3</sup> 1 Bishop Crim. Proced. § 387, 400, 488 *a*.

<sup>4</sup> *Scheffling v. Scheffling*, 17 Stew. Ch. 438.

<sup>5</sup> Ante, § 483–488.

<sup>6</sup> 1 Greenl. Ev. § 61.

<sup>7</sup> Post, § 1352–1356.

<sup>8</sup> *Adams v. Adams*, 20 N. H. 299, 51 Am. D. 219; referring to *Germond v. Germond*, 6 Johns. Ch. 347, 10 Am. D. 335, and *Washburn v. Washburn*, 5 N. H. 195. And see *Prince v. Prince*, 10 C. E. Green, 310.

<sup>9</sup> Ante, § 1332, 1334.

one person could not be the same act as adultery with another. The particular offence alleged must be proved.<sup>1</sup>

§ 1344. **Other Forms of Allegation.** — In reason, speaking without much help from authority, there may be circumstances permitting or requiring forms of allegation quite different from those we have been contemplating. For example, —

§ 1345. **Venereal Disease.** — If a husband has venereal disease contracted since the marriage, and the wife can satisfy the court that it came through his adultery, yet she does not know the time, place, *particeps criminis*, or any other specific fact connected therewith, the law, which permits her to have a divorce, consequently has for her some form of allegation which she can make available. To charge simply that he has committed adultery, and she is ignorant of all the particulars, will not satisfy the foregoing rules. In reason, therefore, the libel should add to its other allegations some reference to the peculiar character of the proofs. And we have cases substantially confirmatory of these views.<sup>2</sup> This reasoning extends likewise to adultery inferred from —

§ 1346. **Pregnancy.** — A wife becomes pregnant while the husband is absent from the country.<sup>3</sup> He knows this and he can prove it, yet no more. The only definite allegation possible is that of the evidence; namely, the pregnancy and its circumstances. In reason, therefore, the libel should be so framed. And we have ecclesiastical authority for saying that in this sort of case it is not necessary to plead particular acts of adultery.<sup>4</sup>

§ 1347. **Habitual Adultery,** — it appears, may be charged in general terms, with a general mention of the participants, and of times and places. On a question of this sort before Dr. Lushington in the Ecclesiastical Court he said: “The seventeenth article is objected to as alleging habitual criminal intercourse without particular specification of times and dates. Now, I do not mean to say that this point is not attended with some difficulty, but yet I apprehend I should not be justified in rejecting this article; if you plead a long duration of time

<sup>1</sup> Bennett v. Bennett, 24 Mich. 482.

<sup>2</sup> Clark v. Clark, 7 Rob. N. Y. 276; Johnson v. Johnson, 14 Wend. 637.

<sup>3</sup> For a case like this, see Heathcote's Divorce Bill, 1 Macq. Ap. Cas. 277.

<sup>4</sup> Durant v. Durant, 1 Hag. Ec. 733,

746, 3 Eng. Ec. 310. And see, as further strengthening this view, Moore v. Moore, 3 Moore P. C. 84; D'Aguilar v. D'Aguilar, 1 Hag. Ec. 773, note, 3 Eng. Ec. 329, 332.



(in this case it is four months) during which a constant and habitual intercourse took place, that is sufficient without pleading specific facts; if you plead circumstances showing that the intercourse was limited, or of short duration, then you must plead the facts specifically."<sup>1</sup>

§ 1348. **More Instances than One** — of adultery may be charged in one libel. This is universal practice, to which objection was never known.

## II. *In General of the Evidence.*

§ 1349. **How much Adultery — (Restricting Evidence).** — However many acts the pleader sets forth in his libel from caution, the proofs under the ordinary forms of the law need establish but one. Yet at the trial the practitioner will not often rest his case on evidence of so little where he has more; because he cannot know how it will be regarded, or what will be brought forward against it. The court will not forbid further proofs, yet will restrain him from wasting its time by going quite uselessly beyond the requirements of the law.<sup>2</sup>

§ 1350. **Competent — Conclusive — Legal Charges.** — The evidence must be legally competent and applicable to legal charges,<sup>3</sup> supplementing adequate allegation by adequate proof.<sup>4</sup> And it must be clear, positive, and satisfactory.<sup>5</sup> Scandal and an adulterous reputation, however distinctly shown, will not suffice,<sup>6</sup> much less will mere suspicion.<sup>7</sup> It must affirmatively convince the understanding of the fact that adultery was committed; since nothing short of the carnal act can lay the foundation for divorce.<sup>8</sup> Now, —

§ 1351. **The Peculiarity** — of this adultery suit, widely distinguishing it from most others, is that the wrong is one of

<sup>1</sup> Graves v. Graves, 3 Curt. Ec. 235, 241.

<sup>2</sup> Richardson v. Richardson, 1 Hag. Ec. 6, 3 Eng. Ec. 13. It is so also in cruelty. Lockwood v. Lockwood, 2 Curt. Ec. 281, 7 Eng. Ec. 114.

<sup>3</sup> Caton v. Caton, 13 Jur. 431, 433; Simmons v. Simmons, 11 Jur. 830, 5 Notes Cas. 324.

<sup>4</sup> Foy v. Foy, 13 Ire. 90, 95.

<sup>5</sup> Rix v. Rix, 3 Hag. Ec. 74, 5 Eng. Ec. 21; Moller v. Moller, 115 N. Y. 466; Reid

v. Reid, 2 C. E. Green, 101; Berckmans v. Berckmans, 2 C. E. Green, 453; Hunn v. Hunn, 1 Thomp. & C. 499; Pollock v. Pollock, 71 N. Y. 137; Donnelly v. Donnelly, 63 How. Pr. 481. Compare with ante, § 762, 763.

<sup>6</sup> Soper v. Soper, 29 Mich. 305; Overstreet v. S. 3 How. Missis. 328; Marble v. Marble, 36 Mich. 386.

<sup>7</sup> S. v. Crowley, 13 Ala. 172.

<sup>8</sup> Hamerton v. Hamerton, 2 Hag. Ec. 8, 4 Eng. Ec. 13, 16, 19.

darkness and secrecy, wherein the parties are rarely surprised. Two consequences follow. First, that however clearly guilt appears from the evidence, its pointings to time and place are often indistinct; and, Secondly, that ordinarily the evidence is of necessity circumstantial.<sup>1</sup> Whence come two doctrines, which will occupy us through the remainder of this sub-title; namely, —

§ 1352. First. *The carnal act need not be proved in time and place. Simply that it transpired, and with the particeps criminis named, must appear from the evidence, but the further question of when and where is immaterial, therefore to pass upon it is unnecessary.*

§ 1353. **Why?** — The reasons appear, perhaps sufficiently, in the elucidations of the last sub-title. But it may be added here that the substance of the charge is the adultery, while the time and place of its commission are mere inconsequential incidents. And, what is conclusive, it is in the nature of circumstantial evidence that only in exceptional instances can it prove them, and to require the impossible would be to abandon justice. But for the doctrine we are considering, the more overwhelming the proofs the more difficult it would often be to establish a case. If a man should sleep with a woman not his wife on a single night, few would doubt that adultery was then committed; but if he slept with her every night for a year, a juror might well hesitate to single out one occasion, on which he was affirmatively satisfied the criminal act was done.

§ 1354. **The Adjudications,** — and *dicta* of eminent judges, severally and collectively establish this doctrine beyond controversy.<sup>2</sup> Dr. Lushington, speaking to particular facts before him,<sup>3</sup> once expressed it thus: “It is not necessary to prove that the adultery with which a party is charged should have occurred at any particular time and place. The court must be satisfied that a criminal attachment subsisted between the parties, and that opportunities

<sup>1</sup> Ayl. Parer. 44, 45; Matchin v. Matchin, 6 Pa. 332, 47 Am. D. 466; Williams v. Williams, 1 Hag. Con. 299, 4 Eng. Ec. 415; Richardson v. Richardson, 4 Port. 467, 30 Am. D. 538; Lawson v. S. 20 Ala. 65, 56 Am. D. 182; Mosser v. Mosser, 29 Ala. 313; Inskip v. Inskip, 5 Iowa, 204; Marble v. Marble, 36 Mich. 386; Chestnut v. Chestnut, 88 Ill. 548; Bast v. Bast, 82 Ill. 584; Black v. Black, 3 Stew. Ch. 228.

<sup>2</sup> Loveden v. Loveden, 2 Hag. Con. 1, 4 Eng. Ec. 461, 462; Caton v. Caton, 13 Jur. 431, 432; Bramwell v. Bramwell, 3 Hag. Ec. 618, 5 Eng. Ec. 233, 234; Tucker v. Tucker, 11 Jur. 893, 894; Dailey v. Dailey, Wright, 514; Hamerton v. Hamerton, 2 Hag. Ec. 8, 4 Eng. Ec. 13; Burgess v. Burgess, 2 Hag. Con. 223, 226, 4 Eng. Ec. 527, 529. And see S. v. Poteet, 8 Ire. 23.

<sup>3</sup> Vol. I. § 111.

occurred when the intercourse, in which it is satisfied the parties intended to indulge, might with ordinary facility have taken place.”<sup>1</sup> Yet quite consistently herewith, and as matter of just caution, he deemed it necessary “to prove that the parties were in some place together where the adultery might probably be committed. Were it indeed otherwise, it might happen that guilty intention would be mistaken for actual guilt; and this would be contrary to all principles of justice, as well as to known rules of jurisprudence.”<sup>2</sup>

§ 1355. **In a Scotch Case**, — wherein a series of adulteries were charged, the Lord President said: “If it had been necessary to take each specific act of adultery alleged separately on the evidence applicable to it alone, there might have been difficulty in holding any one of these acts to be sufficiently proved; but this is not, in my opinion, the way to deal with acts of adultery. There may be no direct evidence of any one act. There may be no sufficient evidence, even circumstantial, applicable to one act alone, if it stood alone; and yet there may be quite enough in what is proved as to the conduct of the defender and her alleged paramour, and their communications and meetings, to justify the inference that they were, during the period specified, in the habitual practice of adultery with one another. If such a case were submitted to a jury, they would be entitled, under the direction of the court, to draw the inference of guilt, without any direct or complete evidence of the commission of any one act of adultery.”<sup>3</sup> The same rules are applied to —

§ 1356. **The Indictment for Adultery**. — The criminal act need not be proved in time as alleged;<sup>4</sup> and the place need only be shown to have been within the jurisdiction of the court.<sup>5</sup>

§ 1357. Secondly. *Though no witness testifies to seeing the adultery, if there are proven facts consistent with the theory of its commission, and inconsistent with any other theory, and if they create in the minds of the triers the degree of affirmative belief required by law*<sup>6</sup> *that it was committed, the evidence will be adequate.* This is called —

§ 1358. **Circumstantial Evidence**. — It proceeds on the doctrine

<sup>1</sup> Davidson v. Davidson, Deane & S. 3d ser. 1091, 1092. Similar is Burdick v. 132, 135; Grant v. Grant, 2 Curt. Ec. 16, Freeman, 120 N. Y. 420.

<sup>7</sup> Eng. Ec. 3, 16.

<sup>2</sup> Caton v. Caton, supra.

<sup>3</sup> Walker v. Fraser, 9 Scotch Sess. Cas.

<sup>4</sup> C. v. Dacey, 107 Mass. 206.

<sup>5</sup> Bishop Stat. Crimes, § 685.

<sup>6</sup> Ante, § 762, 763.

of presumption; namely, from the existence of a known thing or combination of things, that of the unknown after which we are inquiring is inferred.<sup>1</sup> What is thus assumed to be known must, as to each several item, be first duly established. Thereupon,—

§ 1359. **The Rule for the Sufficiency**—of the proven facts to infer adultery is that, if they are not reasonably reconcilable with the assumption of innocence yet are so with that of guilt, the conclusion of guilt will be authorized. But it will not be if either they can be reasonably reconciled with innocence, or cannot with guilt.<sup>2</sup> Circumstances merely suspicious are inadequate,<sup>3</sup> though there are degrees of imprudence from which the offence will be presumed.<sup>4</sup> Still,—

§ 1360. **Care and Circumspection**—should attend all dealings with this class of evidence. We should look separately at each of the facts essential to the inference of guilt, not omitting any indispensable one however minute, and see that itself rests on due proofs. Then, remembering that the burden of proof is on the accuser, not the accused,<sup>5</sup> we should be able to discern clearly that adultery, not simply a suspicion of it,<sup>6</sup> is the true solution of all. And sometimes, yet it is believed rarely, in spite even of due care, the infirmities of human things will intervene, and lead to the unjust finding of guilt. We have certainly one instance related in our American reports wherein this wrong to the party was discovered;<sup>7</sup> and in an English case, the proofs against the wife seemed conclusive, and plainly the judgment that she was an adulteress would have been pronounced, and the grievous conse-

<sup>1</sup> 1 Bishop Crim. Proc. § 1073-1079.

<sup>2</sup> Harris v. Harris, 2 Hag. Ec. 376, 4 Eng. Ec. 160; Dailey v. Dailey, Wright, 514; Langstaff v. Langstaff, Wright, 148; Ferguson v. Ferguson, 3 Sandf. 307; Inskeep v. Inskeep, 5 Iowa, 204; Mosser v. Mosser, 29 Ala. 313; Berckmans v. Berckmans, 1 C. E. Green, 122; Clear v. Reasor, 29 Iowa, 327; Mehle v. Lapeyrollerie, 16 La. An. 4; Jeter v. Jeter, 36 Ala. 391. See Chestnut v. Chestnut, 88 Ill. 548; Hurtzig v. Hurtzig, 17 Stew. Ch. 329; Powell v. Powell, 80 Ala. 595.

<sup>3</sup> Conger v. Conger, 82 N. Y. 603; Cooper v. Cooper, 10 La. 249; Grant v. Grant, 2 Curt. Ec. 16, 55, 7 Eng. Ec. 3, 15; Fraser v. Fraser, 5 Notes Cas. 11, 20; Hunn v. Hunn, 1 Thomp. & C 499; Pol-

lock v. Pollock, 71 N. Y. 137; S. v. Wal-ler, 80 N. C. 401; Smelser v. S. 31 Tex. 95; S. v. Crowley, 13 Ala. 172. In Johnston v. Johnston, Wright, 454, a witness testified: "I have seen him [the defendant] at the house of Susanna Lines, late and early, to the neglect of his own woman; I have seen him hugging and nursing her in company, and I verily believe I might have seen more if I had wished." The court observed that adultery might be suspected, but it was not proved.

<sup>4</sup> Chambers v. Chambers, 1 Hag. Con. 439, 4 Eng. Ec. 445, 448

<sup>5</sup> Hurtzig v. Hurtzig, 17 Stew. Ch. 329.

<sup>6</sup> Conger v. Conger, 82 N. Y. 603.

<sup>7</sup> Stated by Chancellor Walworth in Wood v. Wood, 2 Paige, 108, 112.

quences would have fallen upon her, but for her ability to prove at the trial, beyond the possibility of contradiction, that even then, and after she had cohabited<sup>1</sup> with her husband eight years, she was a virgin!<sup>2</sup>

§ 1361. **Nature of Presumption — (Not Technical).** — The inference of guilt or innocence to be drawn from the proven circumstances, does not depend on technical rules. The ecclesiastical judges, who determined all questions of fact without the aid of a jury, sometimes referred to former decisions of fact as *quasi* precedents,<sup>3</sup> but no absolute authority appears to have been accorded them. "Courts of justice," said Lord Stowell, "must not be duped. They will judge of facts as other men of discernment, exercising a sound and sober judgment on circumstances that are duly proved," judge of them.<sup>4</sup> Again: "The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion;<sup>5</sup> for it is not to lead a harsh and intemperate judgment, moving upon appearances that are equally capable of two interpretations,<sup>6</sup> neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinable upon common grounds of reason; and courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtilties and remote and artificial reasonings, upon such subjects. Upon such subjects, the rational and legal interpretation must be the same."<sup>7</sup> Once more, still quoting from this accomplished judge: "It is physically possible that persons may be in the same bed together without criminal intercourse. Courts

<sup>1</sup> Vol. I. § 1669.

<sup>2</sup> *Hunt v. Hunt*, Deane & S. 121.

<sup>3</sup> *Williams v. Williams*, 1 Hag. Con. 299, 4 Eng. Ec. 415. And see *Alexander v. Alexander*, 2 Swab. & T. 95, 101.

<sup>4</sup> *Chambers v. Chambers*, 1 Hag. Con. 439, 4 Eng. Ec. 445, 448.

<sup>5</sup> s. p. see *Mulock v. Mulock*, 1 Edw. Ch. 14; *Richardson v. Richardson*, 4 Port. 467, 475, 30 Am. D. 538; *Day v. Day*, 3 Green Ch. 444; *Berckmans v. Berckmans*, 1 C. E. Green, 122; *Ferguson v. Ferguson*, 3 Sandf. 307; *Inskeep v. Inskeep*, 5

*Iowa*, 204; *Hurtzig v. Hurtzig*, 17 Stew. Ch. 329.

<sup>6</sup> When the facts relied upon are equally open to two interpretations, and one is consistent with innocence, they will not establish guilt. *Ferguson v. Ferguson*, 3 Sandf. 307. And see *Kirby v. S. 3 Humph. 289*; ante, § 1359.

<sup>7</sup> *Loveden v. Loveden*, 2 Hag. Con. 1, 4 Eng. Ec. 461, 462. This may be considered the leading case upon the evidence of adultery.

of justice, however, cannot proceed on such ground ; finding persons in such a situation as presumes guilt generally, they must presume it in all cases attended with these circumstances.”<sup>1</sup>

§ 1362. **With us.** — Though these quotations are English, the notes show the doctrine to be equally American. In the words of the late eminent Chief-Justice Shaw: “Nor can this course of inquiry and process of reasoning and judging be much aided by technical and artificial rules, or by what are considered established presumptions of fact from other facts. These rules are useful and convenient in their way, in suggesting general considerations, which are applicable to many cases ; but, after all, they are to be taken with so many exceptions and so much allowance that in the result each case must depend mainly upon its own peculiar circumstances. It is impossible, therefore, to lay down beforehand, in the form of a rule, what circumstances shall and what shall not constitute satisfactory proof of the fact of adultery ; because the same facts may constitute such proof or not, as they are modified and influenced by different circumstances.”<sup>2</sup>

§ 1363. **Facts in Combination.** — When the testimony is credited, the facts it establishes will be viewed, not only separately, but in conjunction ; for they interpret one another. Thus contemplated, they may lead to the inference of guilt when separately they would not.<sup>3</sup> This proposition conducts us to the most important one of all ; namely, —

§ 1364. **Rule for Admissibility** — “**Not Thought of.**” — An item of offered circumstantial evidence is admissible or not according, not to any abstract doctrine, but to what goes with it. This fundamental truth often eludes the judicial cognizance, — or, as expressed in numerous places in these volumes, is not thought of by the judges,<sup>4</sup> — so that many of the cases relating thereto appear confused and unsatisfactory. To illustrate the rule, —

§ 1365. **Non-access and Child.** — It will not establish adultery in a wife to show that the husband has been travelling abroad without her, or that she has become a mother. And neither

<sup>1</sup> *Cadogan v. Cadogan*, 2 Hag. Con. 6, note, 4 Eng. Ec. 462 ; *Van Epps v. Van Epps*, 6 Barb. 320 ; *Burchet v. Burchet*, Wright, 161 ; *Bryant v. Bryant*, Wright, 156. But see *S. v. Way*, 6 Vt. 311.

<sup>2</sup> *Dunham v. Dunham*, 6 Law Reporter, 139, 141. Of the like sort are *Allen v. Allen*, 101 N. Y. 658 ; *Names v. Names*,

67 Iowa, 383 ; *Moller v. Moller*, 115 N. Y. 466.

<sup>3</sup> Ante, § 1355 ; *Burgess v. Burgess*, 2 Hag. Con. 223, 228, 4 Eng. Ec. 527, 530 ; *Grant v. Grant*, 2 Curt. Ec. 16, 7 Eng. Ec. 3, 16.

<sup>4</sup> Ante, § 922, and places there cited.

of these facts, when offered alone, will be admitted to proof. But his non-access during a sufficient period, and her giving birth to a child, will together be admissible and conclusive.<sup>1</sup>

### III. *Particular Facts in Evidence.*

§ 1366. **What for this Sub-title.** — Having in the latter part of the last sub-title seen what in general is the nature of circumstantial evidence, and having seen in particular that the admissibility of any offered item will depend upon what accompanies it,<sup>2</sup> we shall here descend to the consideration of specific facts and combinings of them, as tending or not to the establishment of guilt.

§ 1367. **Adultery Probable.** — That adultery is probable is alone no ground to infer its existence in fact. Yet if to inadequate direct or circumstantial evidence of it there is added what renders it probable, the combined proofs may be sufficient while singly they would not be, or not even be admissible. "It is true," said Dr. Lushington, "that in almost all cases adultery is clandestine; but it is equally true in the great majority of cases, where the parties are cohabiting together, that after the discovery of the fact of adultery evidence is produced to show that it is probable. . . . This is a species of evidence the court always looks for, indeed requires wherever the circumstances allow of its production, as was frequently observed by Lord Stowell."<sup>3</sup> So that —

§ 1368. **Proximate Familiarities,** — while alone amounting to nothing, are almost, yet not absolutely, indispensable in connection with more direct proofs.<sup>4</sup> For the lack of which evidence, in a case before the full English Divorce Court, the learned judges refused the decree prayed against a wife who for twenty years had been exemplary in her married life, where adultery was testified to by those who professed to be eye-witnesses. Said Cresswell, J.: "There is not a tittle of evidence to show that, during the whole period of their cohabitation, she had done anything to raise the slightest suspicion of her infidelity

<sup>1</sup> *Caton v. Caton*, 13 Jur. 431; *Richardson v. Richardson*, 1 Hag. Ec. 6, 11, 3 Eng. Ec. 13, 15; *C. v. Shepherd*, 6 Binn. 283, 6 Am. D. 449; ante, § 1346.

<sup>2</sup> Ante, § 1364.

<sup>3</sup> *Dillon v. Dillon*, 3 Curt. Ec. 86, 98, 7 Eng. Ec. 377, 383; *Croft v. Croft*, 3 Hag. Ec. 310, 5 Eng. Ec. 120.

<sup>4</sup> *Caton v. Caton*, 13 Jur. 431, 434.

in the mind of her husband, or that up to the time of the alleged adultery she had in any way misconducted herself. The court is now called upon to believe that Mrs. Alexander at once, without any preparation, condescended to disgrace herself with a groom who had been about two months in her husband's service, with so little regard for delicacy, with so little regard as to whether she was discovered or not, that she was guilty of acts of adultery with him in the face of day, without taking the precaution of pulling down a window-blind or closing a wash-house door."<sup>1</sup>

§ 1369. **Selecting and Marshalling Circumstances.** — When adultery is suspected, the practitioner should become thoroughly informed of all facts, including the remote ones, connected with the parties and their relations, which by any theory could have any relevancy to the question. Even facts apparently quite disconnected from it should not be cast hastily aside as unimportant. What is of no significance alone may be that on which the whole matter will turn when other facts combine with it. When all are thus brought together, the relevancy and consequent admissibility, on the one hand, or, on the other hand, the worthlessness, of each will appear.<sup>2</sup> He can now cast off the useless, and arrange the useful in a way which his skilled understanding will suggest, but which cannot be predetermined by rule. In a large proportion of the cases, those retained will be fitted to the following —

§ 1370. **Common Formula — Two Wills and Opportunity.** — Every act of adultery implies three things, — the disposition in each of the two minds of two participants, and the opportunity. And whenever these three concur, the criminal fact is committed. So that to prove the three is to prove the fact itself.<sup>3</sup> But one

<sup>1</sup> *Alexander v. Alexander*, 2 Swab. & T. 95, 101, 102. And see *Berckmans v. Berckmans*, 1 C. E. Green, 122; *Larrison v. Larrison*, 5 C. E. Green, 100; *Clare v. Clare*, 4 C. E. Green, 37; *Adams v. Adams*, 2 C. E. Green, 324.

<sup>2</sup> *Ante*, § 1364.

<sup>3</sup> *Freeman v. Freeman*, 31 Wis. 235; *Davidson v. Davidson*, Deane & S. 132; *Inskeep v. Inskeep*, 5 Iowa, 204; *Westmeath v. Westmeath*, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238; *Black v. Black*, 3 Stew. Ch. 228; *Harris v. Harris*, 2 Hag. Ec. 376,

4 Eng. Ec. 160; *Bramwell v. Bramwell*, 3 Hag. Ec. 618, 629, 5 Eng. Ec. 232, 238. In the last cited of these cases, which was a divorce suit against the husband, Dr. Lushington said: "It is in evidence that, not merely was there a criminal attachment, but also that this attachment was not rejected; that Jeffrey [the alleged *particeps criminis*] admitted his familiarity, received his correspondence, that opportunities were constant; and there is nothing to show on her [Jeffrey's] part, resistance, nor repudiation, nor that she



alone amounts to nothing, and two together without the third are entirely inadequate. Nor should the court admit evidence to one, except from the promise of counsel or from the assumption that what will render it important will be added. And still —

§ 1371. **Further of this Formula.** — Care should be taken to avoid even this plain formula being misapplied. Thus, if when the three things seemed to combine, the parties were ignorant of each other's inclinations, or if they were restrained by fear, or were under some temporary incapacity, or temporary absence of desire, adultery would not be inevitable. On the other hand, in no case where these three things do not exist together is there adultery; there may be rape, which is not adultery, with two of them. The proof of their concurrence may lie in detached testimony, no witness being able to establish more than one or a part of one of them, or it may assume any other form. The three elements have sometimes been expressed as two; thus, where the opportunity and the will concur the offence is committed, and both being established guilt will be inferred.<sup>1</sup> But if, for example, the mere opportunity is shown, there being no evidence of the will, the inference of guilt does not arise.<sup>2</sup>

§ 1372. **The Evidence to each Element** — of this formula is within the rule that all facts *in pais* are legally provable as well by circumstantial evidence as by direct.<sup>3</sup> So that, to illustrate, any circumstance showing the defendant's probable inclination toward adultery, yet short of an actual adulterous disposition, or his adulterous disposition generally, though with no particular pointing to the alleged *particeps criminis*, or evincing the probable willingness of the latter, or opportunity, is admissible *if properly connected with other evidence*, but otherwise not competent. Not in all the reported cases is the distinction present

at all discountenanced his passion. To doubt from such circumstances that the consummation followed, would be to presume that the effect was not consequent on the natural cause, and that this was a case of extraordinary exception and singular innocence." See also *Soilleux v. Soilleux*, 1 Hag. Con. 373, 375, 4 Eng. Ec. 434, 435, where Lord Stowell observed: "When the criminal disposition of the man has been most satisfactorily proved, and when it is also proved that the con-

duct of this female was so different on former occasions when she had withstood his attacks, — if, after such a situation as is described in the evidence, she ceases to complain, her silence and submission furnish the strongest presumption that his attempt here had been more successful."

<sup>1</sup> *Berckmans v. Berckmans*, 1 C. E. Green, 122, 143.

<sup>2</sup> *Larrison v. Larrison*, 5 C. E. Green, 100; *Mayer v. Mayer*, 6 C. E. Green, 246.

<sup>3</sup> Vol. I. § 1039.

to the judicial mind<sup>1</sup> between this sort of testimony duly connected, and not connected, therefore the cases exhibit some obscurities and seeming conflicts of doctrine, which this explanation removes. To proceed, —

§ 1373. **Adulterous Intent.** — Partly to repeat, whatever indicates with sufficient distinctness the defendant's inclination to adultery is, when duly connected as just explained, admissible. Alone it is of no avail; but when the alleged *particeps criminis* is shown to be of the same mind, and favoring opportunities appear, and especially when the accused persons embrace them with alacrity or create them,<sup>2</sup> the conclusion of adultery becomes reasonable or inevitable.<sup>3</sup> Hence, —

§ 1374. **Familiarities,** — already mentioned in a somewhat different aspect,<sup>4</sup> are evidence more or less tending to show the adulterous intent of both the accused persons. They are equally admissible whether they transpired at times anterior to the fact charged,<sup>5</sup> at times concurrent with the fact,<sup>6</sup> or at times subsequent thereto.<sup>7</sup> For the like reason, yet reaching less far in their effects, —

§ 1375. **Solicitations of other Women** — are evidence to a husband's adulterous intent. Alone, they would not prove adultery actually committed, they would be even inadmissible, but they are of high importance when duly combined with other facts. We have some apparently adverse intimations from American courts; as, in a criminal case of rape, a learned judge speaking to a different aspect of the question said: "It by no means follows that a desire to have sexual intercourse with one person tends legitimately to prove a willingness to have like intercourse with another and different person. Indeed, the reverse is much

<sup>1</sup> Ante, § 1364.

<sup>2</sup> *S. v. Green*, Kirby, 87, 89.

<sup>3</sup> "The intention and determination of both is sufficiently proved, and the opportunity to indulge was ample." Adultery, therefore, was presumed to have been committed. *Derby v. Derby*, 6 C. E. Green, 36, 60; *Black v. Black*, 3 Stew. Ch. 228; *McClung v. McClung*, 40 Mich. 493.

<sup>4</sup> Ante, § 1367, 1368.

<sup>5</sup> *S. v. Wallace*, 9 N. H. 515; *Burgess v. Burgess*, 2 Hag. Con. 223, 4 Eng. Ec. 527; *C. v. Merriam*, 14 Pick. 518, 25 Am. D. 420; *Norfolk v. Germaine*, 12 How.

St. Tr. 927, 945; *C. v. Lahey*, 14 Gray, 91; *Lockyer v. Lockyer*, Edm. Sel. Cas. 107; *Flavell v. Flavell*, 5 C. E. Green, 211; *Smith v. Smith*, 4 Paige, 432, 27 Am. D. 75; *Thayer v. Davis*, 38 Vt. 163. See *Cole v. Manning*, 2 Q. B. D. 611.

<sup>6</sup> *S. v. Marvin*, 35 N. H. 22.

<sup>7</sup> *Thayer v. Thayer*, 101 Mass. 111, 100 Am. D. 110, overruling some previous cases; *Cole v. S. 6 Baxter*, 239, 243; *S. v. Way*, 5 Neb. 283; *Alsabrooks v. S. 52 Ala. 24*. And see *Bishop Stat. Crimes*, § 682. See *Fuller v. Fuller*, 17 Cal. 605; *S. v. Crowley*, 13 Ala. 172.

the most probable.”<sup>1</sup> But whatever we may deem of this exact proposition, most will concede that a husband who has shown himself anxious to commit adultery with any woman, having cast to the winds his marriage vows, and having been denied by the woman he sought, is more liable to be the victim of one who is shown to be seeking him, and to whom he has turned with ample opportunities and snug occasion, than a husband whose heart is untravelled in wish or thought. Another learned judge, in one of the lower New York courts, rejected in terms more plausible the doctrine we are considering, thus: “The trouble, it seems to me, with the evidence is that it goes outside of the issues made by the pleadings, and in effect presents new allegations that the other side is not expected to be able to meet. Acts of adultery not charged cannot be proved. [Referring to a case which simply holds that on an allegation of adultery with one person there cannot be a finding of adultery with another.<sup>2</sup>] The same principle would exclude evidence of conduct leading towards such acts or indicating a willingness to commit such acts, or, in other words, a lustful disposition. I think the evidence was not admissible.”<sup>3</sup> The thing here not thought of<sup>4</sup> is that, not limiting our inquiry to divorce evidence, the settled doctrine of all our courts is quite otherwise. Even in proving a crime, it is no objection to any evidence that it discloses one not charged if also it tends to establish the one in issue. And especially to show the intent with which the evil thing in controversy was done, it is competent to prove another and similar crime not set down in the indictment.<sup>5</sup> So here we produce the defendant’s attempt to commit a like adultery in explanation of like facts brought forward to establish the adultery alleged. Besides, on the theory of this learned judge, the universally received doctrine of the intent and familiarities stated in the last two sections could not be upheld. Added whereto, the proposition with which this section opens is sustained by other American authority,<sup>6</sup> and in England<sup>7</sup> and Scotland<sup>8</sup> it is the

<sup>1</sup> *McDermott v. S.* 13 Ohio St. 332, 334,  
82 Am. D. 444.

<sup>2</sup> *Germond v. Germond*, 6 Johns. Ch.  
347.

<sup>3</sup> *Stevens v. Stevens*, 54 Hun, 490,  
492.

<sup>4</sup> Ante, § 922, 1364.

<sup>5</sup> 1 Bishop Crim. Proced. § 1121-1126.

<sup>6</sup> *Derby v. Derby*, 6 C. E. Green, 36, 60.  
See *Bray v. Bray*, 2 Halst. Ch. 628. But  
see *Washburn v. Washburn*, 5 N. H. 195.

<sup>7</sup> *Forster v. Forster*, 1 Hag. Con. 144,  
4 Eng. Ec. 358, 362; *Soilleux v. Soilleux*,  
1 Hag. Con. 373, 4 Eng. Ec. 434.

<sup>8</sup> *Whyte v. Whyte*, 11 Scotch Sess. Cas.  
4th ser. 710.

law of the courts beyond any reasonable ground for doubt. To state another form of the same doctrine, —

§ 1376. **Wife's Lascivious Conduct.** — Any conduct of a wife indicative of a disposition tending to adultery is a proper item of evidence in a case against her, when duly connected with other evidence. Thus, in the ecclesiastical practice a husband was permitted to plead in his libel that during his absence she had behaved so indecorously as to induce a lady with whom she resided to recommend her removal to her mother.<sup>1</sup> In another case, wherein the evidence did not fully establish adultery, but her conduct had raised distinct suspicions of it, proof that during the progress of the suit the alleged *particeps criminis* had frequently visited her alone, and remained late at night, was received as sufficiently strengthening the former evidence to justify the sentence of divorce.<sup>2</sup> Again, —

§ 1377. **Participant Unchaste.** — Facts tending to show a husband's adultery will be aided in their effect, therefore rendering the evidence admissible, by showing the alleged participating woman to be of unchaste character.<sup>3</sup>

§ 1378. **To repeat the Doctrine,** — in aid of the more direct proofs of the adulterous intent, whatever creates or evinces probabilities of its existence may be shown, though standing alone it would be rejected. Thus, —

§ 1379. **Terms of Marital Cohabitation.** — The stronger the affection and the more perfect the concord between married persons, the less likely is either to commit adultery. Therefore the terms on which the parties cohabited have been considered a material circumstance in this issue, the other proofs showing ground for its introduction.<sup>4</sup> So, —

<sup>1</sup> Croft v. Croft, 3 Hag. Ec. 310, 5 Eng. Ec. 120, 123.

<sup>2</sup> Hamerton v. Hamerton, 3 Hag. Ec. 1, 5 Eng. Ec. 11. Facts tending to show adultery subsequent to that in issue would seem to be admissible or not, according as a connection is established, or not, between the earlier and later transactions. Lawson v. S. 20 Ala. 65, 56 Am. D. 182; S. v. Crowley, 13 Ala. 172. See also 2 Greenl. Ev. § 47.

<sup>3</sup> C. v. Gray, 129 Mass. 474, 37 Am. R. 378.

<sup>4</sup> Dillon v. Dillon, 3 Curt. Ec. 86, 7

Eng. Ec. 377; Richardson v. Richardson, 4 Port. 467, 474, 30 Am. D. 538. In the Action for Criminal Conversation, — the plaintiff commonly wishes to show, in enhancement of damages, his wife's affection for him before the defendant seduced her. For this purpose, her letters, written either to the husband or to third persons, anterior to the seduction, are admissible. Trelawney v. Coleman, 1 B. & Ald. 90; s. c. nom. Trelawney v. Colman, 2 Stark. 191; Willis v. Bernard, 8 Bing. 376, 1 Moore & S. 584, 5 Car. & P. 342; Elsam v. Faucett, 2 Esp. 562; Edwards v. Crock,

§ 1380. **Not in Cohabitation.** — On the other side, amicable intercourse between husband and wife during the pendency of their suit, and while they are not in actual cohabitation, may be produced in defence; for this seems inconsistent with the complainant's belief of the other's guilt.<sup>1</sup> Tending to guilt are —

§ 1381. **Aversions.** — A wife's withdrawal of attachment from her husband and family,<sup>2</sup> her strong dislike of them,<sup>3</sup> the alienation of his feelings from her,<sup>4</sup> and his desertion of her,<sup>5</sup> are severally, when connected with more direct evidence of adultery, admissible against the parties so conducting.

§ 1382. **Husband maintaining Wife.** — In the ecclesiastical practice, if while the parties had been some time living apart the husband brought his adultery suit, it was common for him to plead that he had made her an allowance. She might contradict or qualify the allegation. It does not appear that much importance was ordinarily attached to this circumstance, yet it seems to have been deemed, perhaps justly, of consequence under the facts of special cases.<sup>6</sup> Another item is the —

§ 1383. **Husband's Cruelty.** — As showing the terms of the matrimonial cohabitation, evidence of cruelty has always been received to strengthen the more direct proofs of adultery; though this is itself a separate ground for divorce.<sup>7</sup> "It adds," observes Lord Stowell, "greatly to the probability that such a charge is well founded if it appears that" the defending husband's "affections were visibly estranged from his wife, and therefore more likely to be diverted to other less worthy objects."<sup>8</sup>

4 Esp. 39; *Houlston v. Smyth*, 2 Car. & P. 22, 3 Bing. 127, 10 Moore, 482; *Wilton v. Webster*, 7 Car. & P. 198. So a witness acquainted with the wife, and having had opportunities to observe, may state his opinion as to her affection for her husband. *Trelawney v. Colman*, 2 Stark, supra. As illustrating this proposition, see *Campbell v. S.* 23 Ala. 44. See also *Leary v. Leary*, 18 Ga. 696.

<sup>1</sup> *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377, 381.

<sup>2</sup> *Caton v. Caton*, 13 Jur. 431, 432.

<sup>3</sup> *Croft v. Croft*, 3 Hag. Ec. 310, 5 Eng. Ec. 120, 122.

<sup>4</sup> *Richardson v. Richardson*, 4 Port. 467, 30 Am. D. 538; *Saunders v. Saunders*, 10 Jur. 143, 144.

<sup>5</sup> *Caton v. Caton*, supra; *Kenrick v. Kenrick*, 4 Hag. Ec. 114, 138.

<sup>6</sup> *Grant v. Grant*, 10 Jur. 103.

<sup>7</sup> *Cocksedge v. Cocksedge*, 1 Rob. Ec. 90, 94, 95; *Beach v. Beach*, 11 Paige, 161; *Smith v. Smith*, 2 Phillim. 67, 1 Eng. Ec. 190; *Eldred v. Eldred*, 2 Curt. Ec. 376, 7 Eng. Ec. 144.

<sup>8</sup> *Forster v. Forster*, 1 Hag. Con. 144, 146, 4 Eng. Ec. 358, 360; s. p. *Arkley v. Arkley*, 3 Phillim. 500, 1 Eng. Ec. 461. For something more on this subject, consult *Mulock v. Mulock*, 1 Edw. Ch. 14, 17; and, as to which, the now superseded 2 Bishop Mar. & Div. § 624.

§ 1384. Visiting Bawdy House — (Associating with Prostitutes).

— If a married man associates with prostitutes<sup>1</sup> or without justifying occasion visits a brothel, and especially if when there he shuts himself up in a room with a strumpet, it must be inferred, in the absence of evidence to the contrary, that he does this with the intent to commit adultery; and as the opportunity and the undoubted consent of another party concur with his own intent,<sup>2</sup> the offence must be presumed to be committed.<sup>3</sup> In the words of Lord Stowell, “The act of going to a house of ill-fame is characterized by our old saying that people do not go there to say their paternoster; that it is impossible they can have gone there for any but improper purposes; and that it is universally held a proof of adultery.”<sup>4</sup> So, if a married woman enters a house of ill-fame with a man not her husband,<sup>5</sup> or unattended,<sup>6</sup> it alone is sufficient *prima facie* evidence of her adultery. And this species of proof has been deemed more stringent against the woman than the man.<sup>7</sup> Yet such a visit is open to explanation; as, that it was of philanthropy,<sup>8</sup> or of accident (the character of the house not being known),<sup>9</sup> or of lawful business, or an inveiglement of a wife ignorant of the place by her husband’s spies to furnish ground for a false accusation,<sup>10</sup> not therefore to be construed into an act of guilt.<sup>11</sup>

§ 1385. Inconsistent with Innocence — (Ordinary Presumptions).

— Brothel-visiting is simply an illustration of the wider doctrine that circumstances inconsistent with innocence establish adultery. For further example, proof that the wife was found late at night with a man in her bedroom, both being mostly undressed, and no

<sup>1</sup> Ciocci v. Ciocci, 26 Eng. L. & Eq. 604, 1 Spinks, 121. And see Cook v. Cook, 5 Stew. Ch. 475.

<sup>2</sup> Ante, § 1370, 1371.

<sup>3</sup> Astley v. Astley, 1 Hag. Ec. 714, 3 Eng. Ec. 303; Kenrick v. Kenrick, 4 Hag. Ec. 114, 124, 132; Van Epps v. Van Epps, 6 Barb. 320; Langstaff v. Langstaff, Wright, 148; Richardson v. Richardson, 4 Port. 467, 474, 30 Am. D. 538; Evans v. Evans, 41 Cal. 103. But see Betts v. Betts, 1 Johns. Ch. 197; Platt v. Platt, 5 Daly, 295.

<sup>4</sup> Loveden v. Loveden, 2 Hag. Con. 1, 24, 4 Eng. Ec. 461, 472.

<sup>5</sup> Best v. Best, 1 Add. Ec. 411, 3 Eng.

Ec. 158, 170; Wood v. Wood, and other authorities cited, 4 Hag. Ec. 138, note; Matchin v. Matchin, 6 Pa. 332, 338, 47 Am. D. 466.

<sup>6</sup> Eliot v. Eliot, cited in Williams v. Williams, 1 Hag. Con. 299, 4 Eng. Ec. 415, 417; Ayl. Parer. 45.

<sup>7</sup> Astley v. Astley, *supra*.

<sup>8</sup> For an interesting case, in which the defence of philanthropy was set up and failed, see Ciocci v. Ciocci, 26 Eng. L. & Eq. 604, 1 Spinks, 121.

<sup>9</sup> Edward v. Edward, 6 Scotch Sess. Cas. 4th ser. 1255.

<sup>10</sup> Cane v. Cane, 12 Stew. Ch. 148.

<sup>11</sup> Latham v. Latham, 30 Grat. 307.

justifying occasion appearing;<sup>1</sup> or that she visited a single man at his lodgings,<sup>2</sup> and there "the windows were shut, and there were letters which could not be otherwise explained,"<sup>3</sup> will be adequate against her. Says an old Scotch writer: "The ordinary presumptions are the being oft alone together, gifts, love-letters, close doors, the wife's being abroad all night, *nudus cum nuda, et solus cum sola*, the entertaining persons that are known to be pimps."<sup>4</sup>

§ 1386. **Polygamously Marrying — Cohabiting.** — A formal marrying implies the intent to proceed further. But to show against one accused of adultery simply this act of marriage and no more is not quite enough;<sup>5</sup> for though it is completed polygamy, it is not adultery. Yet it will suffice to add thereto an ostensible living together by the parties as husband and wife, for then the carnal act will from the whole be inferred.<sup>6</sup>

<sup>1</sup> *Names v. Names*, 67 Iowa, 383. Of the like sort, *Culver v. Culver*, 11 Stew. Ch. 163.

<sup>2</sup> Not alone sufficient to convict. *Williams v. Williams*, 1 Hag. Con. 299, 4 Eng. Ec. 415, 417.

<sup>3</sup> *Ricketts v. Taylor*, cited in *Williams v. Williams*, supra. And see *Clement v. Kimball*, 98 Mass. 535, 537.

<sup>4</sup> *McKenzie* Crim. Law, 177 (Works ii. p. 121).

<sup>5</sup> *Reemie v. Reemie*, 4 Mass. 586; *Wilson v. Wilson*, *Wright*, 128. And see *Ellis v. Ellis*, 11 Mass. 92; *Cayford's Case*, 7 Greenl. 57; *Horne v. Horne*, 2 Swab. & T. 48.

<sup>6</sup> *Nash v. Nash*, 1 Hag. Con. 140, 4 Eng. Ec. 357; *Masten v. Masten*, 15 N. H. 159, 161. In a case where no formal solemnization was shown, but the defendant was living with a woman whom he introduced to his friends as his wife, who among them was reputed to be such, and with whom he had confessed cohabitation, the court — it would seem without due consideration of the evidence — refused to draw the conclusion of adultery. *Hart v. Hart*, 2 Edw. Ch. 207. It is believed that this case is not different in principle from the others, therefore, and because in natural reason no one would doubt that sexual intercourse transpired between these parties, we may deem it to be wrong. Further as to which, — **Blunderings.** — In the first five editions of my

now superseded "Marriage and Divorce," in § 436 of the one-volume editions, and § 628 of the second volume of the two-volume editions, I stated this case of *Hart v. Hart* as follows: "Where there was no celebration of marriage shown, the court refused to infer adultery from the mere unaided fact of the defendant and a woman living in the same house together, under the reputation of being married, while they were not. But if he gave currency himself to the repute, the evidence plainly would be stringent; and in a case where there was no suspicion of collusion, it should, on principle, be deemed satisfactory." Referring to this case again in a subsequent section (in the one-volume editions, § 453, note; in the two-volume editions, Vol. II. § 646, note), I said, "but, query, whether this was decided right." Thus, I repeat, the matter stood in every one of the first five editions. I am now following the substance of a note which appeared in Vol. II. § 628 of the sixth edition. To proceed, — the reader may imagine my surprise when in collecting material for the sixth edition, I came upon the following, in an opinion from an able and learned judge in the New York Court of Appeals: "In *Hart v. Hart*, 2 Edw. Ch. 207, a husband was living separately from his wife, and had a woman residing with him. No other cohabitation (i. e. no cohabitation in the technical meaning, living together as man and wife, from *cohabitare*

§ 1387. **Living in Same House or Family.** — Where there is no marriage in form, or pretence of marriage, or other false putting

of the old English law), was shown. The vice-chancellor said that the court would not grant a decree in such a case upon conjectures, and that he must have stronger testimony before he made a decree. That case is questioned by Mr Bishop in one edition of his text-book on Marriage and Divorce (the fourth edition, 646 [453]), but I find no disapproval of it, nor any comment upon it in any judicial opinion in this State, and Mr. Bishop has suppressed his unfavorable comment in a subsequent edition (5th ed. § 628). My judgment concurs with that of Vice-Chancellor Edwards." *Pollock v. Pollock*, 71 N. Y. 137, 146. I have looked into all the digests of this case of *Hart v. Hart* to which I have had access, and in substance they concur with one another, and the learned judge in the above extract concurs with them, as to what it decides. If the facts passed upon were truly what he and the digest-makers state them to have been, I should deeply regret not deserving the praise he awards me for having, in the fifth edition, suppressed my "unfavorable comment." This case occupies but a single page in Edwards's Reports. Yet I seem to be the only person who has read it since it passed from the hands of the proof-reader. The evidence consisted of the statement of a single witness, who, to use the exact and entire language of the report, "swore that he had been to the defendant's house, and was there introduced to a lady as Mrs. Hart, whose real name was Mary Braddock; that she had the charge of the defendant's house and acted as the mistress of it; and the defendant had admitted to the witness his having had cohabitation with Mary Braddock. Also, that the latter is reputed to be the wife of the defendant among his acquaintances." If it were permissible to attribute oversight to the learned vice-chancellor himself, we might doubt whether even he ever read the evidence on which he passed. It was in the form of an affidavit; and he says, it "merely sets forth that the defendant is living separate from his wife and has a woman residing with him. No other cohabita-

tion is proved." It is perceived that my own early statement of the case hardly put the facts and the decision so palpably antagonistic as the exact truth required. The respect with which I have always regarded the superior wisdom of learned judges has not unfrequently in my law writings, as in the present instance, led to under-statement when compelled to point out their mistakes. No instance of over-statement, in unfavorable criticism of any judicial opinion, has ever been mentioned to or discovered by me. There are so many persons, even upon the bench, who deem it the duty of a legal author to bend and break the truth for the preservation of our fetish of judicial infallibility; and among those who stop short of this extreme opinion, there are so many who look upon it as sinful to utter any word in the presence of a judicial blunder; and among those who theoretically permit a mistake to be pointed out, there are so many who regard it as the author's duty to smother the correction under such a blanket of expressed doubt, of respect for those who happened at a particular moment not to see a truth, and of hesitancy whether or not there is after all any difference between the sum of two and two and the latest patented invention, as by bewilderment to incapacitate the reader to see any thing, — that I have often, in preparing a new edition, endeavored to smooth down the angles and rough places in whatever would imply disbelief of the absolute infallibility of the judicial office. But the difference between making honey and writing legal doctrine — occupations commonly assigned to animals of different species — is so great that I fear my success in this sort of mixing has not been marked. On the other hand, my consciousness of never having by adverse criticism wronged any man, on the bench or off, living or dead, is something of which I am not ashamed to say I am proud. And if the reader could know with what carefulness, with what searchings of every sort, with what weighings of possibilities, — with what repetitions of these processes in the preparation of



on of appearances, the fact that the accused parties live in the same house or family, or otherwise are for a lawful and proper purpose often together, falls far short of proving adultery. This is a sort of question which presents itself under varying facts, addresses itself to good sense without much regard for technical rule, and requires no further elucidation.<sup>1</sup>

§ 1388. **Concealment — Clandestine Acts** — may create or augment the inference of adultery, where otherwise it would not exist, or would be less distinct.<sup>2</sup> For example, if a wife keeps from the knowledge of her husband her meetings with the alleged paramour,<sup>3</sup> or the fact of his lodging at the house in the husband's absence,<sup>4</sup> or her having correspondence with him;<sup>5</sup> if the husband pretends that a young woman with whom he is intimate is his niece while she is not;<sup>6</sup> or, *a fortiori*, if the wife calls herself by a false name, and with a man not her husband occupies for eight or nine months a room in which there is only one bed,<sup>7</sup> — the inference of adultery is permissible. But —

§ 1389. **Wife and Child present.** — A man will not ordinarily be presumed to have committed adultery in the same bed whereon are his wife and child.<sup>8</sup>

§ 1390. **Deranged Dress. — Gifts.** — The deranged dress of a woman at a particular time may aid the inference that adultery was then committed;<sup>9</sup> presents from the man, accepted by her, may in due circumstances if unexplained assist the general inference.<sup>10</sup>

§ 1391. **Particular Customs and Modes of Life,** — prevailing in

every subsequent edition, — the title to this pride has been purchased, he would be impressed, at least, with this, that in proportion to the value of a thing is its cost.

<sup>1</sup> Pollock v. Pollock, 71 N. Y. 137; Freeman v. Freeman, 31 Wis. 235; S. v. Crowley, 13 Ala. 172; S. v. Waller, 80 N. C. 401; Richardson v. S. 34 Tex. 142; Smelser v. S. 31 Tex. 95; Mayo v. Mayo, 119 Mass. 290. See Rickard v. Rickard, 9 Or. 168.

<sup>2</sup> Black v. Black, 3 Stew. Ch. 228. **Correspondence.** — A letter from the wife's alleged paramour, not received or brought to her knowledge, is not ordinarily admissible against her. Hobby v. Hobby, 64 Barb. 277.

<sup>3</sup> Bramwell v. Bramwell, 3 Hag. Ec.

618, 5 Eng. Ec. 232; Elwes v. Elwes, 1 Hag. Con. 269, 4 Eng. Ec. 401, 402.

<sup>4</sup> Grant v. Grant, 2 Curt. Ec. 16, 7 Eng. Ec. 3.

<sup>5</sup> Loveden v. Loveden, 2 Hag. Con. 1, 4 Eng. Ec. 461, 469, 470; Lockwood v. Lockwood, 2 Curt. Ec. 281, 7 Eng. Ec. 114, 124; Morse v. Morse, 2 Hag. Ec. 608, 4 Eng. Ec. 220.

<sup>6</sup> Kenrick v. Kenrick, 4 Hag. Ec. 114, 129; Harris v. Harris, 2 Hag. Ec. 376, 4 Eng. Ec. 160, 167.

<sup>7</sup> Scroggins v. Scroggins, Wright, 212.

<sup>8</sup> Scott v. Scott, Wright, 469; Smith v. Smith, Wright, 644

<sup>9</sup> S. v. Marvin, 35 N. H. 22.

<sup>10</sup> Cocksedge v. Cocksedge, 1 Rob. Ec. 90, 98.

the locality or among the class of persons under consideration, may greatly influence the result derivable from circumstances like most of those before stated.<sup>1</sup> "For instance," says Poynter, "there are many freedoms which in the unreserved contact of humble life continually take place without imputation; whilst an equal license in classes of a higher order, and of a more refined education, would naturally lead to a very different conclusion."<sup>2</sup> So,—

§ 1392. **Near of Kin — Physician and Patient — Pastor and Parishioner.**—Where the parties are near of kin,<sup>3</sup> or physician and patient,<sup>4</sup> a carnal intercourse will be less readily inferred; and according to the old canonists, if a clergyman is detected embracing a woman in some secret place, this does not, as with ordinary people, prove adultery, for "he is not presumed to do it on the account of adultery, but rather on the score of giving his benediction or exhorting her to penance,"<sup>5</sup>—a good illustration of the principle, but few in modern times will concede so much to clerical virtue as this application of it implies. Nor should the principle itself be allowed a latitude excluding the obvious import of the evidence.<sup>6</sup>

§ 1393. **Venereal Disease**—is presumed to be the product of sexual commerce with an infected person. And *prima facie* a husband's adultery has been inferred from his having it long after the marriage.<sup>7</sup> Its appearance soon after marriage does not lead to this conclusion, because antenuptial misconduct may have produced it.<sup>8</sup> And it is likewise possible that the wife contracted it illicitly and gave it to him; so that in reason this

<sup>1</sup> Vol. I. § 1593, 1600; *Harris v. Harris*, 2 Hag. Ec. 376, 4 Eng. Ec. 160, 169; *Loveden v. Loveden*, 2 Hag. Con. 1, 4 Eng. Ec. 461; *Lawson v. S.* 20 Ala. 65, 56 Am. D. 182.

<sup>2</sup> *Poynter Mar. & Div.* 187.

<sup>3</sup> *Kenrick v. Kenrick*, 4 Hag. Ec. 114, 129. And see *Griffiths v. Reed*, 1 Hag. Ec. 195, 3 Eng. Ec. 79.

<sup>4</sup> *Dunham v. Dunham*, 6 Law Reporter, 139.

<sup>5</sup> Ayl. Parer. 51. In the Scotch case of *King v. King*, 4 Scotch Sess. Cas. 2d ser. 567, this canonical defence was pertinent to the facts, but was not relied on. And see *Freeman v. Freeman*, 31 Wis. 235; *Mayo v. Mayo*, 119 Mass. 290.

<sup>6</sup> *Grant v. Grant*, 2 Curt. Ec. 16, 7 Eng. Ec. 3, 14.

<sup>7</sup> *Johnson v. Johnson*, 14 Wend. 637, per Savage, C. J.; *Popkin v. Popkin*, 1 Hag. Ec. 765, note, 3 Eng. Ec. 325, 326. **Medicines.**—The possession of mixtures common in the medical treatment of venereal disease may be a circumstance to be considered with other proofs. *Mack v. Handy*, 39 La. An. 491.

<sup>8</sup> *Popkin v. Popkin*, *supra*. Proof that a husband within six months after his marriage to a widow had venereal disease, does not establish his adultery against his sworn denial. *Mount v. Mount*, 2 McCarter, 162, 82 Am. D. 276.

possibility should be estimated in connection with what appears with it in the particular case. There have been attempts to establish adultery against the husband by showing the wife to have recent infection; but both in reason and by the adjudications this conclusion is not to be accepted simply as of course. All the circumstances must be brought into the account, and together duly weighed.<sup>1</sup>

§ 1394. **Stains on the Husband's Linen.** — though, it seems, admissible, are not alone sufficient evidence of his adultery; since they do not necessarily establish even his infection with venereal disease. Discharges from other causes may, when dry, so nearly resemble those of syphilitic origin as not to be distinguishable therefrom.<sup>2</sup>

§ 1395. **Wish to be rid of Wife.** — There are circumstances wherein it will strengthen a wife's defence to show that prior to the alleged adultery, the husband wished to be rid of her.<sup>3</sup>

§ 1396. **Delay** — is explained in a preceding chapter.<sup>4</sup> It weighs more or less against a complaining husband that he did not bring his suit while the proofs were fresh.<sup>5</sup>

§ 1397. **Showing Own Incapacity.** — In a case of good faith, there would seem to be no objection to a husband's repelling a charge of adultery with proof that he is physically impotent. Indecency of evidence, we have seen, cannot take away rights.<sup>6</sup> But under the special facts of one case, this evidence was refused.<sup>7</sup> And perhaps the refusal may be just whenever fraudulently an impotent man is asking what will permit him to marry a second time, to the misleading and injury of his victim.

#### IV. *Supplemental Questions of Evidence.*

§ 1398. **In this Sub-title,** — passing out from the contemplation of the ordinary circumstantial evidence, we shall look into some special questions; as, —

<sup>1</sup> Collett v. Collett, 1 Curt. Ec. 678, 686; on appeal to Jud. Com. of Privy Council, July 14, 1840, Wadd. Dig. 38; Holthoefer v. Holthoefer, 47 Mich. 260. See also Stone v. Stone, 3 Notes Cas. 278, 290; Cook v. Cook, 5 Stew. Ch. 475.

<sup>2</sup> Ferguson v. Ferguson, 1 Barb. Ch. 604.

<sup>3</sup> Bray v. Bray, 2 Halst. Ch. 506, 628.

<sup>4</sup> Ante, § 412-429.

<sup>5</sup> Berckmans v. Berckmans, 1 C. E. Green, 122.

<sup>6</sup> Ante, § 770, 1265.

<sup>7</sup> Clapp v. Clapp, 97 Mass. 531, 533.

§ 1399. *Connecting a Former and Subsequent Period of Sexual Commerce*: —

**Continuing.** — When an adulterous intercourse is once shown, if then the parties are living together or in the same house, its continuance will generally be presumed;<sup>1</sup> or, if they are not so living, less evidence will be required to establish a second adultery than was needed for the first.<sup>2</sup>

§ 1400. **Before and after Marriage.** — Marriage is a promised abandonment, and commonly such in fact, of any sexual commerce which may have existed between either of the parties and a third person. Therefore in reason, in moral propriety, and in law, it is not permissible simply to show against a husband or wife an antenuptial incontinence and a postnuptial opportunity, as the sole foundation for a finding of adultery.<sup>3</sup> But when in any proper way ground for this evidence appears, it may be introduced. So that we have cases, English, Scotch, and American, wherein the antenuptial and postnuptial were thus united in the proofs.<sup>4</sup>

§ 1401. **The Distinction** — between the admissible and inadmissible under the present head is more clear in reason than generally it appears in the cases. From the principle that the admissibility of this as of other circumstantial evidence depends on what goes with it,<sup>5</sup> we have the clear conclusion that marriage cuts the connection between the earlier incontinence and the later opportunity<sup>6</sup> when only these two facts are shown. But a connection between what is antenuptial and what is postnuptial may be established in numerous other ways. For example,

<sup>1</sup> *Smith v. Smith*, 4 Paige, 432, 27 Am. D. 75; *Beeby v. Beeby*, 1 Hag. Ec. 789, 3 Eng. Ec. 338, 342; *Turton v. Turton*, 3 Hag. Ec. 338, 5 Eng. Ec. 130, 136; *Carotti v. S.* 42 Missis. 334, 97 Am. D. 465.

<sup>2</sup> *Armstrong v. Armstrong*, 32 Missis. 279.

<sup>3</sup> *Graves v. Graves*, 3 Curt. Ec. 235, 7 Eng. Ec. 425, 427; *Best v. Best*, 1 Add. Ec. 411, 2 Eng. Ec. 158, 169; *Perrin v. Perrin*, 1 Add. Ec. 1, 2 Eng. Ec. 11, *Devall v. Devall*, 4 Des. 79; *Hedden v. Hedden*, 6 C. E. Green, 61.

<sup>4</sup> *Ciocci v. Ciocci*, 26 Eng. L. & Eq. 604, 627, 1 Spinks, 121; *Letham v. Proven*,

2 Scotch Sess. Cas. new ed. 250; *Van Epps v. Van. Epps*, 6 Barb. 320; *Bray v. Bray*, 2 Halst. Ch. 628; *Brooks v. Brooks*, 145 Mass. 574, 1 Am. St. 485; *Hicks v. S.* 86 Ala. 30. And see *Simmons v. Simmons*, 11 Jur. 830, 5 Notes Cas. 324. **Bawdy-house before and after forbidding Statute.** — On a charge of keeping a house of ill fame, the prosecutor was permitted to show that the defendant's house was such anterior to the prohibiting statute going into operation, as aiding the proof of its character afterward. *Caldwell v. S.* 17 Conn. 467.

<sup>5</sup> Ante, § 1364.

<sup>6</sup> Ante, § 1399, 1400.

lust-denoting familiarities will be specially avoided by the parties if the commerce is really ended, so that their appearance after marriage will make their former relations relevant. To further illustrate, —

§ 1402. *Continuing in Service.* — Dr. Lushington, in one case, after mentioning the general rule which excludes antenuptial incontinence, said of the particular evidence: “The first fact to be noticed is that the woman with whom connection is pleaded before marriage is continued in the service of the husband after marriage. The next fact is that the adultery is charged to have taken place with this very same person. It appears to me that this circumstance does form a necessary exception to the rule, and one which I am bound to engraft upon it; . . . because circumstances which may be proved subsequently to the marriage will have a very different complexion whether they are taken standing alone, without reference to preceding circumstances, or whether they are taken in conjunction with antecedent criminal connection itself.” After speaking further to the special fact of the woman’s being continued in the husband’s service, conduct, the reader will observe, inconsistent with reformation, he concludes by admitting the evidence as set out in the libel.<sup>1</sup>

§ 1403. *Verdicts and Judicial Records:* —

*Between Third Persons.* — A verdict rendered where neither litigant was a party is inadmissible.<sup>2</sup> And where one only was a party the result is commonly the same. Thus, —

§ 1404. *Verdict for Necessaries.* — In a husband’s divorce suit for the wife’s adultery, which she defended by setting up his adultery in recrimination, Dr. Lushington refused to admit among her proofs a verdict obtained against him by a third person for necessaries furnished her.<sup>3</sup> But to this sort of doctrine the books have apparent exceptions; as, —

§ 1405. *Verdict in Criminal Conversation.* — We have seen how, in England, before the statute of 20 & 21 Vict. c. 85, abolished the action, this verdict was employed in rebuttal of connivance.<sup>4</sup> On ordinary principles of evidence, it would be quite inadmissible; the wife not having been a party to the proceeding in which it

<sup>1</sup> *Weatherley v. Weatherley*, 1 Spinks, 193, 195, 196.

<sup>2</sup> *Brisco v. Brisco*, cited 1 Hag. Ec. 165, 168, 3 Eng. Ec. 77, 78.

<sup>3</sup> *Jenkyn v. Jenkyn*, Deane & S. 268.

<sup>4</sup> *Ante*, § 246.

was rendered. Nor in a testamentary case would the Ecclesiastical Court accept a verdict in ejectment.<sup>1</sup> But in divorce suits, though the admission of these verdicts was much resisted, their competency became at length established, — chiefly as negating collusion,<sup>2</sup> and showing the husband's honesty of endeavor to obtain the law's redress.<sup>3</sup> Possibly some of the cases concede a little more to it,<sup>4</sup> yet all regard it as not properly evidence against the wife, or lightening the burden of the husband's proof.<sup>5</sup> With us, actions for criminal conversation are less frequent than they were formerly in England, and we have no reported case wherein this verdict was considered. Its acceptance would be doubtful, unless possibly in circumstances quite exceptional.

§ 1406. **Verdict in Criminal Cause.** — In some of our States, adultery is punishable by indictment. Is a verdict in the criminal cause admissible, and with what effect, in the divorce suit? In general, a jury's conclusion or the judgment of the court thereon, in a prosecution in the name of the State, is not competent to a controverted fact in a private suit wherein one of the parties is different.<sup>6</sup> Nor is a verdict or judgment in a civil case admissible in a criminal.<sup>7</sup> But we have seen that while in form there are only two parties to the divorce suit, there are in legal effect three; the government, which in the indictment is plaintiff, constituting the third party.<sup>8</sup> The result is that both the parties to the indictment are parties in the divorce suit. Aside from which view, it cannot fail to aid the conscience of the judge in discharging his duty of protecting the public against divorces for sham offences, to know that this public has itself indicted and convicted the defendant. And when in the divorce suit the same defendant has suffered himself to be defaulted, so that he cannot complain if judgment is rendered against him without evidence,<sup>9</sup>

<sup>1</sup> *Grindall v. Grindall*, 3 Hag. Ec. 259, 5 Eng. Ec. 101; *Price v. Clark*, 3 Hag. Ec. 265, 5 Eng. Ec. 103.

<sup>2</sup> *Ante*, § 246; *Price v. Clark*, *supra*; *Phillips v. Phillips*, 1 Rob. Ec. 144, 156.

<sup>3</sup> *Williams v. Williams*, 1 Hag. Con. 299, 4 Eng. Ec. 415, 418.

<sup>4</sup> *Forster v. Forster*, 1 Hag. Con. 144, 4 Eng. Ec. 358, 364; *Chambers v. Chambers*, 1 Hag. Con. 439, 4 Eng. Ec. 445, 448; *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377, 391; *Halford v. Halford*, *Poynter Mar. & Div.* 200, note.

<sup>5</sup> *Williams v. Williams*, *supra*; *Loveden v. Loveden*, 2 Hag. Con. 1, 4 Eng. Ec. 461, 484; *Evans v. Evans*, 1 Rob. Ec. 165, 170; *Best v. Best*, 1 Add. Ec. 411, 2 Eng. Ec. 158, 170. See also *Elwes v. Elwes*, 1 Hag. Con. 269, 4 Eng. Ec. 401, 410, note; *Williams v. Williams*, 3 Barb. Ch. 628.

<sup>6</sup> 1 Greenl. Ev. § 537; 1 Stark. Ev. 219. But see *Maybee v. Avery*, 18 Johns. 352.

<sup>7</sup> *S. v. Hogard*, 12 Minn. 293; *Hill v. S.* 22 Tex. Ap. 579.

<sup>8</sup> *Ante*, § 479-498.

<sup>9</sup> *Ante*, § 496, 703, 704.

and only the interests of the public remain to be protected, it would seem upon principle that the record of conviction should be received as alone sufficient. It has been adjudged admissible as a confession, when rendered on a plea of guilty, even where the conviction was in another State.<sup>1</sup> But—

§ 1407. **Weight—Limit of Doctrine.**—The question of its sufficiency, where the respondent appears and defends, is not so clear. That it is not an estoppel to conclude further inquiry is certain. But as the plaintiff in the divorce suit could not have been a witness in the criminal proceeding,<sup>2</sup> why should not the record *prima facie* establish the fact charged? In Maine it has been held sufficient, as well in a contested as a defaulted case, to prove both the marriage and the adultery.<sup>3</sup> The principle seems to be the same which governs a—

§ 1408. **Record of Conviction for Sodomy.**—Sodomy, including the attempt to commit it, being a cause for divorce in England,<sup>4</sup> a wife whose husband had been convicted criminally of assaulting another man by attempting unnatural practices upon him, sued the husband for a divorce. In her libel she pleaded, as the sole ground of evidence,<sup>5</sup> the record of his conviction. The Consistory Court of York, under the misapprehension that a mere attempt would not authorize the sentence, yet not doubting the sufficiency of the proof, rejected the libel. The High Court of Delegates, on appeal, admitted it, and pronounced for the divorce, which was followed by an act of Parliament dissolving the marriage.<sup>6</sup> Again,—

§ 1409. **Same for Polygamy.**—Polygamy is a step toward adultery, not adultery itself.<sup>7</sup> Therefore a record of conviction for the former is not alone sufficient evidence to found a divorce for the latter.<sup>8</sup> On a question of the administration of a deceased person's effects, a conviction for polygamy is evidence, not conclusive, of the nullity of the second marriage.<sup>9</sup> Yet because it is not an estoppel, one proceeded against for the nullity of a second

<sup>1</sup> Burgess v. Burgess, 47 N. H. 395,

<sup>2</sup> See 1 Greenl. Ev. § 537, note; 2 Ib. § 45, note; Maybée v. Avery, 18 Johns. 352; Nelson v. Evans, 1 Dev. 9.

<sup>3</sup> Anderson v. Anderson, 4 Greenl. 100, 16 Am. D. 237; Randall v. Randall, 4 Greenl. 326.

<sup>4</sup> Vol. I. § 1829–1832.

<sup>5</sup> Ante, § 452, 456, 573, 575.

<sup>6</sup> Bromley v. Bromley, 2 Add. Ec. 158, note, 2 Eng. Ec. 260, Poynter Mar. & Div.

184, note. See also Ellenthrop v. Myers, 2 Add. Ec. 158, note, 2 Eng. Ec. 261; Boyle v. Boyle, Comb. 72, 3 Mod. 164; Mogg v. Mogg, 2 Add. Ec. 292, 2 Eng. Ec. 311.

<sup>7</sup> Ante, § 1386.

<sup>8</sup> Wilson v. Wilson, Wright, 128 See Reemie v. Reemie, 4 Mass. 586; Patterson v. Gaines, 6 How. U. S. 550.

<sup>9</sup> Wilkinson v. Gordon, 2 Add. Ec. 152, 2 Eng. Ec. 257.

marriage may set up in bar the nullity of the first, though he has been convicted of polygamy in entering into the second,—the record of his conviction being, it would seem, only *prima facie* evidence of the nullity which it implies.<sup>1</sup> But—

§ 1410. **A Judgment in Acquittal**—of one obviously does not bind another. The reason for which is two-fold,—he against whom it is offered was not a party to the former litigation; and it ascertains no fact, merely showing the government to have failed in making out its case. Therefore the record of a person's acquittal on an indictment for having two wives was held incompetent evidence in a civil cause, where the validity of the second marriage was controverted.<sup>2</sup>

§ 1411. *Identity*:—

**General.**—When a sexual commerce or facts indicating it are testified to, there must be evidence from the same or other witnesses of what are called the identity and diversity of the parties; namely, that one of them was the defendant, and the other was not the plaintiff.<sup>3</sup> To aid this part of the proofs,—

§ 1412. **Decree of Confrontation.**—The ecclesiastical courts sometimes resorted to what is termed a decree of confrontation. It was applied for on special grounds, and was in the form given in a note.<sup>4</sup> The defendant thereupon was produced to a witness

<sup>1</sup> Bruce v. Burke, 2 Add. Ec. 471, 2 Eng. Ec. 381; Rogers Ec. Law, 2d ed. 635. See also P. v. Buckland, 13 Wend. 592; Hudson v. Robinson, 4 M. & S. 475, 479; Dew v. Clark, 2 Add. Ec. 102, 111, 113, 2 Eng. Ec. 242, 246, 248; Maule v. Mounsey, 1 Rob. Ec. 40, 48; Bray v. Bray, 1 Hag. Ec. 163, 3 Eng. Ec. 76. But where, after a husband's conviction of bigamy, the first wife brought in the English Divorce Court her petition for dissolution on the ground of his "bigamy with adultery," Sir C. Cresswell observed: "You must remember that the bigamy must be proved. Proof of the conviction of bigamy will not suffice." March v. March, 2 Swab. & T. 49, 50.

<sup>2</sup> Gilb. Ev. 34. See further, 1 Phillips Ev. Cow. & Hill ed. 336 et seq. and notes; Fairchild v. Adams, 14 Law Reporter, 278, 281; U. S. v. Gibert, 2 Sumner, 19, 97; Anonymous, 2 Sim. n. s. 54, 11 Eng. L. & Eq. 281; P. v. Buckland, 13 Wend. 592, 596, and cases there cited.

<sup>3</sup> Sullivan v. Sullivan, 2 Add. Ec. 299, 2 Eng. Ec. 314; Williams v. Williams, 1 Hag. Con. 299, 4 Eng. Ec. 415, 418; Dillon v. Dillon, 3 Curt. Ec. 86, 100, 7 Eng. Ec. 377; Hamerton v. Hamerton, 2 Hag. Ec. 8, 4 Eng. Ec. 13.

<sup>4</sup> **Form of Decree.**—"Herbert Jenner Fust, Knight, Doctor of Laws, Official Principal of the Arches Court of Canterbury, lawfully constituted. To all and singular clerks and literate persons, whomsoever and wheresoever, in and throughout the whole province of Canterbury, greeting:—

"Whereas we, rightly and duly proceeding in a cause of divorce or separation from bed, board, and mutual cohabitation, by reason of adultery, now depending before us in judgment by virtue of letters of request, &c. between George Savage Curtis, of the parish of, &c. the party promoting the said cause, on the one part, and Emma Curtis, his lawful wife, of the same parish, &c. the



who had known her in both characters of wife and adulteress, or simultaneously to two or more witnesses who could separately identify her in each character.<sup>1</sup> Further as to which,—

§ 1413. **Later in England.** — By construction of the divorce statutes, the present English divorce tribunal grants the decree of confrontation in separation<sup>2</sup> but not in dissolution<sup>3</sup> suits,—following the ecclesiastical practice in the former, and a section of the Divorce Act which provides a different method in the latter.<sup>4</sup>

§ 1414. **With us,** — in no reported case from any of our States, has this decree of confrontation been so much as considered. The question pertains to the domain of practice. The early and long-continued ignorance of the ecclesiastical practice among American lawyers accounts for this condition of the question with us. But for this long silence, there are States in which plainly this decree would in proper cases be granted. Further speculation would be idle.

§ 1415. **Other Methods** — for proving the identity, generally less effective than this confrontation decree, will in particular cases suggest themselves. The presumption of identity from the identity of names is sometimes available.<sup>5</sup> Or by withholding

party accused and complained of, on the other part, have at the petition of the proctor of the said George Savage Curtis, alleging that it is necessary that the said Emma Curtis should be confronted with divers credible witnesses to be produced, sworn, and examined touching the matters at issue in the said cause, decreed the said Emma Curtis to be cited and called to appear in judgment on the day, at the time and place, to the effect and in manner and form hereinafter mentioned (justice so requiring). We do therefore hereby authorize, empower, and strictly enjoin and command you, jointly and severally, peremptorily to cite or cause to be cited the said Emma Curtis to appear personally before us, our surrogate, or some other competent judge in this behalf, in the Common Hall of Doctors' Commons, situate, &c. on the by-day after Trinity Term, to wit, Monday, the twenty-fourth day of June, &c. at the hour of ten in the forenoon, and there to abide if occasion require during the sitting of the

said court, then and there to undergo a confrontation with divers credible witnesses to be in this cause then and there produced and sworn, and further to do and receive as unto law and justice shall appertain, under pain of the law and contempt thereof, at the promotion of the said George Savage Curtis; and what you shall do or cause to be done in the premises you shall duly certify us, our surrogate, or some other competent judge in this behalf, together with these presents.

"Dated at London," &c. Coote Ec. Pract. 336.

<sup>1</sup> Searle v. Price, 2 Hag. Con. 187, 4 Eng. Ec. 524; Curtis v. Curtis, 5 Moore, P. C. 252, 10 Jur. 165.

<sup>2</sup> Enticknap v. Rice, 4 Swab. & T. 136.

<sup>3</sup> Hooke v. Hooke, 4 Swab. & T. 236, 28 Law J. n. s. Mat 29.

<sup>4</sup> And see 2 Bishop Mar. & Div. 6th ed. § 641 and note, for fuller statements.

<sup>5</sup> P. v. Rolfe, 61 Cal. 540.

temporary alimony,<sup>1</sup> or the privilege of making an appearance when asked as a favor,<sup>2</sup> or by denying anything else which is not of strict right, until the party will submit to identification, the court may sometimes compel it. A little ingenuity of counsel and the acquiescence of the court will often pilot a cause out of this difficulty.<sup>3</sup>

§ 1416. *Participants in the Adultery, and Persons otherwise connected with it and them:*—

**The Party's Confessions**—of adultery have already been considered.<sup>4</sup>

§ 1417. **Third Persons.**—The confessions of a paramour, not in the presence of the party or communicated to him, are inadmissible.<sup>5</sup> And the same was held of the acknowledgment by a wife's agent to the clergyman at a christening, that the child was not the husband's but another man's: the agent should have been called.<sup>6</sup>

§ 1418. **Conduct**—is in special circumstances different. Thus, where the accused husband's intent to commit adultery was fully established, and only the consent of a female on whose chastity he had made attempts was wanting, her subsequent conduct was deemed stringent evidence of her having yielded.<sup>7</sup>

§ 1419. **Participants as Witnesses.**—The *particeps criminis*, if willing to testify, may be a witness, equally where the adultery is indictable and where it is not. But this evidence, like that of an accomplice in any crime,<sup>8</sup> should be corroborated;<sup>9</sup>

<sup>1</sup> Jacobson v. Jacobson, 14 Daly, 255.

<sup>2</sup> Hindmarsh v. Hindmarsh, Law Rep. 1 P. & M. 24.

<sup>3</sup> Further as to which see Lloyd v. Lloyd, Law Rep. 1 P. & M. 222; Hulse v. Hulse, Law Rep. 2 P. & M. 357, 358, 2 Eng. Rep. 149.

<sup>4</sup> Ante, § 707-729; Mack v. Handy, 39 La. An. 491; Summerbell v. Summerbell, 10 Stew. Ch. 603; Haggard v. Haggard, 62 Iowa, 82; Powell v. Powell, 80 Ala. 595.

<sup>5</sup> Burgess v. Burgess, 2 Hag. Con. 223, 4 Eng. Ec. 527; Harris v. Harris, 2 Hag. Ec. 376, note, 4 Eng. Ec. 160, 172; Doughty v. Doughty, 5 Stew. Ch. 32; Croft v. Croft, 3 Hag. Ec. 310, 5 Eng. Ec. 120, 125; Matchin v. Matchin, 6 Pa. 332, 47 Am. D. 466; Lawson v. S. 20 Ala. 65, 56 Am. D. 182. See C. v. Bowers, 121 Mass. 45.

<sup>6</sup> Faussett v. Faussett, 13 Jur. 688.

<sup>7</sup> Soilleux v. Soilleux, 1 Hag. Con. 373, 4 Eng. Ec. 434

<sup>8</sup> 1 Bishop Crim. Proceed. § 1160, 1169 1170; Simmons v. Simmons, 1 Rob. Ec. 566, 571.

<sup>9</sup> Best v. Best, in the Arches Court, 1823, Poynter Mar. & Div. 198, note; s. c. in Consist Court, 1 Add. Ec. 411, 2 Eng. Ec. 158, 170; Simmons v. Simmons, 11 Jur. 830, 5 Notes Cas. 324, 1 Rob. Ec. 566; Emmons v. Emmons, Walk. Mich. 532; Van Cort v. Van Cort, 4 Edw. Ch. 621; Lewis v. Lewis, 9 Ind. 105; Anonymous, 5 Rob. N. Y. 611; Don v. Douglas, 10 Scotch Sess Cas. 2d ser 1046; Brown v. Brown, 5 Mass. 320; Herrick v. Herrick, 31 Mich. 298; Banta v. Banta, 3 Edw. Ch. 295; Hedden v. Hedden, 6 C. E. Green, 61. See Mayo v. Mayo, 119

and it is always to be listened to with caution.<sup>1</sup> The doctrine appears to be the same which is applied to other accomplices; namely, that the court will advise the jury not to find a verdict on their sole and uncorroborated testimony, yet since the law has made them competent,<sup>2</sup> the triers of the fact may do it, and their finding will not ordinarily be disturbed.<sup>3</sup>

§ 1420. **Common Prostitutes** — are tainted witnesses, and courts have refused divorce on their uncorroborated testimony.<sup>4</sup> Yet whenever in the particular instance it is sufficiently convincing to the judge or jury passing on the fact, no legal reason appears for declining to act upon it, though without collateral support.<sup>5</sup> And —

§ 1421. **Not Believed.** — However competent in age, under-

Mass. 290; Bibby v. Bibby, 6 Stew. Ch. 56.

<sup>1</sup> Astley v. Astley, 1 Hag. Ec. 714, 3 Eng. Ec. 303, 304, 306; Moulton v. Moulton, 13 Me. 110; Van Epps v. Van Epps, 6 Barb. 320; Wood v. Wood, 2 Paige, 108, 112; S. v. Crowley, 13 Ala. 172; Thompson v. Thompson, 10 Rich. Eq. 416, 424; Ciocci v. Ciocci, 26 Eng. L. & Eq. 604, 1 Spinks, 121; Ginger v. Ginger, Law Rep. 1 P. & M. 37; Mayer v. Mayer, 6 C. E. Green, 246. See Pollock v. Pollock, 71 N. Y. 137.

<sup>2</sup> Ante, § 787-790.

<sup>3</sup> Further cases to the doctrine of this section are Payne v. Payne, 42 Ark. 235; Scheffling v. Scheffling, 17 Stew. Ch. 438; Moller v. Moller, 115 N. Y. 466. **Taking into Custody.** — A practitioner introducing a witness of this sort, in a State where adultery is indictable, cannot be absolutely sure that the court will not order him into custody, or in some form direct criminal proceedings against him. In one of the early Massachusetts cases, where an alleged *particeps criminis* was produced to prove the offence, the court said they would not refuse to swear him; but if his testimony showed him to be the paramour, they should recommend to the solicitor-general to lay the case before the grand-jury. If the counsel should omit to ask the witness with whom the adultery was committed, the court would put the inquiry. Brown v. Brown, 5 Mass. 320. See Spencer v. S. 31 Tex. 64.

A case analogous to this is Dunbar v. Dunbar, Wright, 286. I have seen in the books nothing else of this practice. Accomplices in criminal causes testify constantly in our tribunals, and the judge does not interfere. It may be said that this is because they appear under the protection of a public officer. But it is believed that such protection is not necessary to this result. The court itself takes cognizance of the courses of justice. And where in a divorce case responsible counsel call the guilty third person, it is believed that most judges will not undertake practically to exclude the evidence. I remember a case which occurred many years ago in Massachusetts while I was in practice. I called the female *particeps criminis*, read to her a particular allegation of adultery, and asked her to say if she knew of her own knowledge whether or not the charge was true. She said she did possess such knowledge, and it was true. Not a further question was put to her either by the opposing counsel or by the very able judge upon the bench. On this and other evidence the divorce was granted, and the witness went home undisturbed. But the adultery was committed out of the State, and I think this fact appeared.

<sup>4</sup> Turney v. Turney, 4 Edw. Ch. 566; Moller v. Moller, 115 N. Y. 466. See also the Scotch case of Sim v. Miles, 12 Scotch Sess. Cas. 633.

<sup>5</sup> Cases cited to last section; Paul v. Paul, 10 Stew. Ch. 23.

standing, or otherwise any witness may be,<sup>1</sup> his testimony will not justify a finding unless it is believed.<sup>2</sup> The triers must be satisfied that he is honest, not mistaken, and his testimony is true.<sup>3</sup>

§ 1422. **Pimps, Private Detectives**, — and other witnesses partly under a cloud, are in a measure within the rules stated in the last few sections; but they differ, and there are special considerations applicable severally to them.<sup>4</sup>

§ 1423. **Husband or Wife of Particeps Criminis**. — In States where adultery is not indictable, the husband or wife of the *particeps criminis* may in a divorce cause be a witness to it. But Vice-Chancellor McCoun, while so ruling, added that it is otherwise where adultery is a crime.<sup>5</sup> And this plainly results from the common-law prohibition of an accusation of crime by one married party against the other.<sup>6</sup> Perhaps the rule should also be that such party shall not thus publicly accuse the other of a mere infamous breach of matrimonial duty and social decorum and decency. On the other hand, on an indictment of a man for adultery in New Hampshire, the principal witness to it was the husband of the woman; there was a conviction, and the court sustained it; but the witness testified "without objection," and this question was not discussed.<sup>7</sup> By force of statutes in various States, husband and wife may in these causes testify to each other's guilt.<sup>8</sup>

§ 1424. *Character*: —

**Differences**. — There are some contrarieties of opinion upon the right of parties in civil causes to put in issue their characters. Space cannot here be spared for elucidations of this general question. Instead of which we shall simply consider a few —

§ 1425. **Divorce Rulings**. — In a husband's divorce suit for the wife's adultery, the majority of the Connecticut Court held that

<sup>1</sup> Ante, § 772-790; *Kneale v. Kneale*, 28 Mich. 344.

<sup>2</sup> Ante, § 763.

<sup>3</sup> *Bray v. Bray*, 2 Halst. Ch. 506, 628; *Sopwith v. Sopwith*, 4 Swab. & T. 243.

<sup>4</sup> Ante, § 774; *Blake v. Blake*, 70 Ill. 618; *Whitenack v. Whitenack*, 9 Stew. Ch. 474; *Moller v. Moller*, 115 N. Y. 466. And see the elucidations in 1 Bishop Crim. Proc. § 1173-1176.

<sup>5</sup> *Van Cort v. Van Cort*, 4 Edw. Ch.

621, 624. And see *S. v. Bridgman*, 49 Vt. 202, 24 Am. R. 124.

<sup>6</sup> 1 Bishop Crim. Proc. § 1151; *S. v. Welch*, 26 Me. 30, 45 Am. D. 94; *S. v. Gardner*, 1 Root, 485; *Cotton v. S.* 62 Ala. 12; *C. v. Gordon*, 2 Brews. 569.

<sup>7</sup> *S. v. Marvin*, 35 N. H. 22.

<sup>8</sup> *S. v. Bennett*, 31 Iowa, 24; *Morrill v. S.* 5 Tex. Ap. 447. See *Wells v. Wells*, 6 Stew. Ch. 4.

she could not bring forward her good character in reply to his inculpatory evidence, for the reason that the divorce suit is civil, and the right claimed is limited to criminal prosecutions.<sup>1</sup> But alike in principle and authority, the better doctrine is believed to be that the rules of evidence are the same in civil as in criminal causes, when the issue, which is the test, is the same.<sup>2</sup> So that, for example, where one defended an action of slander by an attempt to prove that the words were true, the plaintiff was permitted to introduce testimony to his good character in reply, as in criminal proceedings.<sup>3</sup> The rule, applicable equally in civil cases and in criminal, was stated by Chancellor Walworth to be "that if a party is charged with a crime, or any other act involving moral turpitude, which is endeavored to be fastened upon him by circumstantial evidence, or by the testimony of witnesses of doubtful credit, he may introduce proof of his former good character."<sup>4</sup> Therefore in Missouri evidence of general good character is permitted to the defendant in the divorce suit for adultery.<sup>5</sup> Yet, on the other hand, in perfect accord with this doctrine, the New Hampshire Court will not suffer a husband, asking a divorce for his wife's adultery, to augment his proofs by showing her character to be that of a lewd and unchaste woman.<sup>6</sup> Further, —

§ 1426. **Exceptional.** — Not in accord with what is thus stated, some judges have admitted evidence of character in divorce causes quite beyond what is permissible in any other. Thus, it was said in Ohio that the *complainant's* reputation for chastity is in the adultery divorce suit always in issue, yet not particular acts not averred in defence, and not the defendant's reputation.<sup>7</sup> It was once common in the ecclesiastical libel for cruelty to set out the characters of the parties, such as that the complaining wife was mild and tender and the responding husband morose and tyrannical, but not much evidence to these allegations was commonly

<sup>1</sup> *Humphrey v. Humphrey*, 7 Conn. 116.

<sup>2</sup> See 1 Greenl. Ev. § 65; Lord Chancellor Erskine, in *Melville's Case*, 29 How. St. Tr. 549; Vol. I. § 1036; 1 Bishop Crim. Proced. § 1046

<sup>3</sup> *Harding v. Brooks*, 5 Pick. 244. Where the evidence was offered before the defendant had put in his testimony, it was rejected *Cornwall v. Richardson*, Ryan & Moody N. P. 305.

<sup>4</sup> *Townsend v. Graves*, 3 Paige, 453, 455; 1 Greenl. Ev. 5th ed. § 54, 55, and notes. For an exposition of the doctrine in criminal causes, see 1 Bishop Crim. Proced. § 1112-1119.

<sup>5</sup> *O'Bryan v. O'Bryan*, 13 Mo. 16, 53 Am. D. 128.

<sup>6</sup> *Washburn v. Washburn*, 5 N. H. 195. See *Miller v. Miller*, 5 C. E. Green, 216, *Thomas v. Thomas*, 51 Ill. 162.

<sup>7</sup> *Harper v. Harper*, Wright, 283.

produced. Lord Stowell pointed out the evils of the practice,<sup>1</sup> and this sort of averment seems to have been dropped out from the libel.<sup>2</sup> Plainly neither the old ecclesiastical nor the old Ohio idea ought to find any general following with us.

§ 1427. *The Doctrine of this Chapter restated.*

The libel for adultery should, after averring the marriage, charge the criminal act with time, place, and name of the participant. But a particular time, place, or name may be rendered unnecessary by stating the fact to be unknown if so it truly is. Names must be proved as alleged, or proved as unknown if such is the form of the averment, but a variance in time or place is not commonly material. The adulterous act being ordinarily secret, only in rare instances can eye-witnesses to it be produced. Hence in most cases the evidence is circumstantial. The circumstances, to be adequate in proof, need not when severally viewed apart from the rest be inculpatory, but in combination they must together be inconsistent with innocence and consistent with guilt. The admissibility of any one circumstance is not determined by its tendency when standing alone to establish guilt, for it may be admitted while thus having no such tendency, but by its effect in combination with the other circumstances. The ordinary rules of evidence, familiar in other civil causes, govern also this divorce suit for adultery.

<sup>1</sup> *Evans v. Evans*, 1 Hag. Con. 35, 40, 41, 4 Eng. Ec. 310, 312, 313. And see *Dysart v. Dysart*, 1 Rob. Ec. 106, 141.

<sup>2</sup> It is so, at least, with the forms given in Coote Ec. Pract. 320, 350.

## CHAPTER XLIII.

## CRUELTY.

- § 1428, 1429. Introduction.  
 1430-1438. The Allegation in General.  
 1439-1445. Combinings of Allegation and Proofs.  
 1446-1455. The Evidence.  
 1456. Doctrine of Chapter restated.

§ 1428. **Elsewhere.**—The law of this subject, which from its special nature largely includes the evidence, is explained in the first volume.<sup>1</sup>

§ 1429. **How Chapter divided.**—We shall consider, I. The Allegation in General; II. The Combinings of the Allegation and Proofs; III. The Evidence.

I. *The Allegation in General.*

§ 1430. **Peculiar — How.**—The mutual relation of injury and allegation is in this divorce suit for cruelty special, differing widely from what we see elsewhere in legal proceedings. The thing complained of is unique. It is not an act or class of acts definable by a reference simply to their nature, their form, their extent, or their name. It is any conduct which has wrought a particular result. But the result—the test whereby to determine whether it is cruelty or not—is not a tangible substance; it is a mental condition, created in persons other than the one accused, as well as in him. It is “any conduct in one of the married parties which, to the reasonable apprehension of the other, or in fact, renders cohabitation physically unsafe, to a degree justifying a withdrawal therefrom.”<sup>2</sup> This conduct may consist, under very special circumstances, of a single act.<sup>3</sup> But commonly, with one

<sup>1</sup> Vol. I. § 1524-1652.

<sup>3</sup> Vol. I. § 1604-1606.

<sup>2</sup> Vol. I. § 1531.

or a few acts pre-eminently reprehensible, it is the sum of the entire conjugal life. The case oftenest occurring is where the whole life is connected with and gives color to a few significant deeds and words. But all cannot be written down in specific detail. How, then, shall the allegation be?

§ 1431. **The Principle**—giving shape to our entire law of pleading is, that averments of facts relied on for redress shall be as specific and as informing to the other party as the circumstances reasonably permit. And where a fact is of a nature not to be made specific by any reasonable amount of words, a mere general allegation will suffice. What within reasonable limits can be done is required, no more.<sup>1</sup> Applying this doctrine to the question in hand, —

§ 1432. **How the Libel.** —Duly connected with the allegations of jurisdiction<sup>2</sup> and marriage,<sup>3</sup> the libel should state in general terms the defendant's conduct and manner of life whence physical ill to the plaintiff is to be apprehended from a continuance of the cohabitation. These things need not be reduced to detail, for the reason that in their nature they cannot be. But acts of violence, threats, and other like doings can be thus set out; and the libel should contain in definite averment, with time and place, all such, or as many as, added to the general ill-conduct, will show a completed ground for relief.<sup>4</sup> The whole should be such that in some way, though not necessarily by direct words, the danger from future cohabitation will appear. If, for example, bodily suffering is charged as actually inflicted, the danger will be apparent; and so from various other forms of averment where danger is not directly stated. Again, —

§ 1433. **Statutory Terms.** —This wrong being, within the rules of pleading, statutory, though the interpretations of the statutes are embodied in the unwritten law, the statutory terms should be employed in the allegations, to the extent required in other pleadings on statutes.<sup>5</sup>

<sup>1</sup> 1 Bishop Crim. Proc. § 325, 494, 497, 526, 528, 531.

<sup>2</sup> Ante, § 589-595.

<sup>3</sup> Ante, § 604-611.

<sup>4</sup> Campbell v. Campbell, 27 Ill. Ap. 309; Mercer v. Mercer, 114 Ind. 558; White v. White, 84 N. C. 340; Brook v. Brook, 12 P. D. 19.

<sup>5</sup> Ante, § 598; Horne v. Horne, 1 Tenn. Ch. 259; Pennington v. Pennington, 10 Philad. 22; Schlichter v. Schlichter, 10 Philad. 11, referring to Gordon v. Gordon, 48 Pa. 226, and Jones v. Jones, 66 Pa. 494.



§ 1434. **Formula.**—It results from the foregoing that the terms of the allegations will greatly vary with the differing cases. But as a general formula, to be filled up in accord with the special facts, it is believed that the following will be helpful. After setting out the marriage, and either before or after the jurisdictional averments, as convenient, proceed:—

That during the entire [*or the latter part of the*] cohabitation which followed said marriage, from, &c. to, &c. the said respondent treated your complainant with extreme cruelty [*or extreme and repeated cruelty and neglect, or otherwise, employing here the terms of the statute*] and, among other things, at, &c. on, &c. did, &c. and on another occasion, on, &c. at, &c. did, &c. [*setting out as much of this sort of matter as seems practically best*], by reason whereof a continuance of said cohabitation became physically unsafe to your complainant, whereupon she left him and relinquished the same.

§ 1435. **The Ecclesiastical Libel.**—which charged the wrong and the evidence of it together, rendering it ordinarily an unfit precedent for us,<sup>1</sup> is less objectionable in a cruelty cause than in one for adultery; since the specific acts of cruelty are likewise evidence from which the danger of cohabitation is inferred, so that in a qualified sense the evidence is in the cruelty libel to be set out.<sup>2</sup> Therefore the following form, extracted from a book of ecclesiastical practice, may be helpful with us. After setting forth an adulterous connection entered into by the defendant with a woman named, the libel proceeds:—

Ninth, That from the time the said H formed the guilty connection before pleaded, to wit, the month of February, 1844, and until his said wife separated herself from him as hereinafter pleaded, he constantly treated her with the greatest violence and contumely; that he habitually called her an old bitch, a bloody or blasted old bitch, an old bawd, and the like opprobrious names, without the slightest provocation on her part; that he used to destroy the furniture of the house, break the windows, and do other acts of a nature to alarm or terrify his said wife, and the party proponent doth expressly allege and propound that in consequence of such the ill-treatment of the said H, the health of the said Sophia became and still continues to be greatly impaired.

Tenth, That on the evening of the 21st day of December, 1844, the said H, without any provocation on the part of his said wife, struck her as she was sitting on a couch in the drawing-room of their said house at Lewisham, so violent a blow on the eye with the back of his hand, upon which he wore a ring, that her eye was nearly closed, and became and remained black for many days afterwards [*and was seen in that state by different persons*]; that the said H then spat in the face of his said wife, and also threw a tumbler

<sup>1</sup> Ante, § 573, 575.

<sup>2</sup> Vol. I. § 1553, 1554.

full of hot elder wine over her, and told her that thenceforward he should take his meals in a separate room, which he accordingly did for a long time after.

Eleventh, That on the evening of the tenth day of September last, the said H, after applying many abusive epithets to his said wife, urged her to allow him a further sum of £200 per annum (she having, at the time and in contemplation of the said marriage, as the party proponent expressly alleges and propounds, settled upon him the yearly sum of £100), and upon her refusing so to do, rushed towards her in an infuriated state, and pressing one of his clenched fists hard upon her forehead, and shaking the other close to her face, roared out, "Damn you, you bloody old bitch, it is fortunate for you that I am not drunk to-day," or to that effect; and then said, seizing her by the arm and thigh, "Shall I throw you out of the window, you bitch?" — adding, "No, I will not, to-day; but the next time I come home in such a temper, especially if I have had any gin, I will not answer for the consequence;" that the said H then left the house, and did not return that night; that the said Sophia also the next morning left the said house, and has ever since lived separate and apart from her said husband [but that previous to her so leaving the said house she showed to ———, her servant, the marks on her arm produced and left by the violence of the said H].<sup>1</sup>

§ 1436. **Allegation in English Divorce Court.** — The rules of the English Divorce Court<sup>2</sup> have not provided a form specially for cruelty. The following is from a current book of practice:—

3. That on the            day of           , in the year of our Lord one thousand eight hundred and           , and on other occasions, the said John Jones did, at           , make an assault upon and beat the petitioner.

4. That shortly after their said marriage the said John Jones commenced and has to the present time continued treating your petitioner with great unkindness and cruelty, that he frequently endeavored to extort and did extort large sums of money from your petitioner by violence and threats of violence, that he frequently in violent and offensive language abused your petitioner, violently assaulted her, and on one occasion, in the month of January, 1858, struck your petitioner on the forehead, and that by reason of the said continued ill-treatment on the part of her said husband, your petitioner's health has been greatly impaired.

5. That by reason of her husband's ill-treatment and threats, your petitioner has on divers occasions been compelled to leave her house and seek the protection of her friends, but has been induced to return to cohabitation with her said husband by his solemn promise that he would treat her kindly for the future; that in consequence of her said husband violating his promises, and continuing to treat your petitioner with said unkindness and cruelty,

<sup>1</sup> Coote Ec. Pract. 354-356. The allegation of showing the marks to the servant, and the other allegation put by me in brackets, are important in the ecclesias-

tical practice, but quite improper in ours. These are good illustrations of the distinction between the differing systems.

<sup>2</sup> Ante, § 576.

your petitioner was compelled to seek the protection of the law; that accordingly, on the 10th day of April, instant, your petitioner's said husband was by warrant brought before \_\_\_\_\_, one of the magistrates sitting at the \_\_\_\_\_, and was by the said magistrate bound over to keep the peace towards your petitioner for three months; that your petitioner nevertheless has been too much alarmed to return, and has not returned to cohabit with her said husband.<sup>1</sup>

§ 1437. **General — Specific.** — Taking up the statement of the contents of the libel where we left it a little way back,<sup>2</sup> we shall find on looking into the cases that they are not in absolute harmony. But on the whole they accord with the reason of the law in establishing two propositions, one of which is that an allegation of cruelty in general terms,<sup>3</sup> or in the mere statutory words, is permissible. There may even be doubt whether in just pleading it can ever be dispensed with. The other proposition is that however necessary may be this general allegation, it alone and unaided by a bill of particulars,<sup>4</sup> will not suffice, but specific facts must likewise, with greater or less minuteness, be set out.<sup>5</sup> And, where the trial is by jury, the court decides on the sufficiency of the facts charged, and the jury determines whether or not they transpired.<sup>6</sup> There may be exceptional States in which less particularity is required.<sup>7</sup> And whether the libel alone satisfies the demands of the law or not, the court in a proper case will order a bill of the particulars.<sup>8</sup> And —

§ 1438. **Further as to which.** — Distinguishing specific acts of cruelty from cruel conduct in general, it is believed that such and so many of the former as the law requires to be proved in detail, must be thus individually averred,<sup>9</sup> yet not necessarily

<sup>1</sup> Browne Div. Pract. 4th ed 598; Browne & P. Div. 614. It is not necessary for every paragraph to allege a fact or facts whereon alone, if proved, the court would found a sentence. Allegations short of this are permissible as showing the habits and animus of the accused party. *Leete v. Leete*, 2 Swab. & T. 568.

<sup>2</sup> Ante, § 1431, 1432.

<sup>3</sup> *Saunders v. Saunders*, 1 Rob. Ec. 549, 556.

<sup>4</sup> Ante, § 1338.

<sup>5</sup> *Harrison v. Harrison*, 7 Ire. 484; *Lewis v. Lewis*, 5 Misso. 278, *Hill v. Hill*, 10 Ala. 527; *Wright v. Wright*, 3 Tex.

168; *Byrne v. Byrne*, 3 Tex. 336; *Wilson v. Wilson*, 2 Dev. & Bat. 377; *Conn v. Conn*, *Wright*, 563; *Nogees v. Nogees*, 7 Tex. 538, 58 Am. D. 78; *Hare v. Hare*, 10 Tex. 355; *Brown v. Brown*, 2 R. I. 381; *Fellows v. Fellows*, 8 N. H. 160; *Ward v. Ward*, 1 Tenn. Ch. 262; *Horne v. Horne*, 1 Tenn. Ch. 259.

<sup>6</sup> *Harrison v. Harrison*, supra; *Wright v. Wright*, supra; *Byrne v. Byrne*, supra.

<sup>7</sup> *Sanders v. Sanders*, 25 Vt. 713.

<sup>8</sup> *Leete v. Leete*, 2 Swab. & T. 568; *Brook v. Brook*, 12 P. D. 19.

<sup>9</sup> Ante, § 1432; *Squires v. Squires*, 3 Swab. & T. 541.

more. Nearly in accord with this proposition, it was laid down in Alabama that the complaint need not specify every act of cruelty relied on, but it should state one or more acts, and the rest may be proved under the general charge.<sup>1</sup> In just principle, the one or more should not fall short of what the law demands of specific ill-doing to render the offence complete. It was laid down in New Hampshire that the specification of the acts of cruelty must be made with reasonable certainty of time, place, and circumstances.<sup>2</sup> "We do not mean," said Sargent, J., "that no evidence will be received of any fact or circumstance not set forth in the libel, but that the material facts upon which the libellant relies must be substantially set forth therein."<sup>3</sup> One view is that in equity the too general form of allegation can be taken advantage of only by a special demurrer;<sup>4</sup> but not all appear so to hold.<sup>5</sup>

## II. *The Combinings of the Allegation and Proofs.*

§ 1439. **Harmonize.** — This cruelty suit is within the ordinary rule of law that allegation and proof must correspond. For example, a wife's complaint being that the husband had treated her cruelly "by neglecting her, by violently pushing her, by striking her with his fist, by depriving her of food, and otherwise," she was not permitted to sustain it by evidence that he had infected her with venereal disease.<sup>6</sup> And where the charge was that the defendant had inflicted blows on a particular day, the plaintiff

<sup>1</sup> *Reese v. Reese*, 23 Ala. 785.

<sup>2</sup> *Smith v. Smith*, 43 N. H. 234; *K. v. K.* 43 N. H. 164.

<sup>3</sup> *K. v. K.* *supra*, at p. 165. The form in *Walton v. Walton*, 32 Barb 203, was adjudged sufficient.

<sup>4</sup> *Hill v. Hill*, 10 Ala. 527. And see *Lewis v. Lewis*, 5 Misso 278; *Breinig v. Breinig*, 26 Pa. 161; *Butler v. Butler*, 1 Parsons, 329; *Steele v. Steele*, 1 Dall. 409.

<sup>5</sup> And see *Wilson v. Wilson*, 2 Dev. & Bat. 377. Neither bad nor good. — Since a court cannot do otherwise than uphold or disallow a pleading, it sometimes happens that what is properly enough adjudged sufficient is unfit to be followed in practice. An instance of what is at least not to be commended is

a wife's averment that the husband, "soon after their marriage, commenced treating her and did treat her with cruelty and inhumanity; that on various occasions he has inflicted blows upon her in anger, and with much violence, thereby endangering her health and life; that he has refused to supply her with the necessaries and comforts of life, when it was in his power to supply her with them; that he still persists in this course of treatment towards her; and that she cannot, with any degree of comfort or safety, continue longer to live with him." *Smedley v. Smedley*, 30 Ala. 714. See also *Hughes v. Hughes*, 19 Ala. 307.

<sup>6</sup> *Squires v. Squires*, 3 Swab. & T. 541, 542. And see *Canfield v. Canfield*, 34 Mich. 519.

“was,” in the language of Chapman, C. J., “permitted to offer evidence of the infliction of blows on a single day, and of all the circumstances that occurred on that day, relating as well to the temper, language, and manner of the libellee, as to the infliction of the blows. But evidence of previous similar, independent instances of ill treatment and misconduct on other occasions was properly excluded as an independent ground of divorce, because it was not pertinent to the issue which the libellant had chosen to offer by her allegations.<sup>1</sup> The cause could not,” he continued, “be tried upon allegations not made. It would not be in conformity with the rules of pleading, nor just to the libellee, who was entitled to have the matters relied upon set forth, at least by some general allegations, so that he could be prepared to meet them. If the allegations had been general, he might have moved for specifications, if necessary; but as the allegations were limited to a single specified act, he needed no further specifications, and was bound to meet merely that charge.”<sup>2</sup> These two cases illustrate the disasters which may follow a lack of care in the pleadings. Thus we come to the evidence on allegations —

§ 1440. **General and Specific united.**—Where the libel charges both general cruelty and specific instances, as it ought,<sup>3</sup> the foregoing expositions show that proofs of the specific must in form fit the specific allegations. Precisely in like manner the general allegations and the proofs thereunder should not be out of harmony.<sup>4</sup> But harmonious general cruelty may be shown under the general averment,<sup>5</sup> just as specific cruelty may be proved under the specific. Beyond which, the just doctrine is believed to be, not only that the specific proofs will aid the general and the general the specific, when thus both have been introduced under their respective averments, but harmonious general and special facts not alleged may be brought forward in evidence after the foundation for them has thus been laid.<sup>6</sup> The case is like one of circumstantial evidence, explained in the last chapter: what would be irrelevant and inadmissible standing alone becomes relevant

<sup>1</sup> Jewell v. Jewell, 2 Swab. & T. 573  
And see Bennett v. Bennett, 24 Mich. 482.

<sup>2</sup> Ford v. Ford, 104 Mass. 198, 205, 206  
Similar is Brook v. Brook, 12 P. D. 19.

<sup>3</sup> Ante, § 1432, 1437, 1438; Saunders v. Saunders, 1 Rob. Ec. 549.

<sup>4</sup> And see Miller v. Miller, 43 Iowa, 325.

<sup>5</sup> Squires v. Squires, 3 Swab. & T. 541.

<sup>6</sup> Segelbaum v. Segelbaum, 39 Minn. 258. This case, as in many other instances of cited cases is not broad enough to cover the full doctrine of the text.

and important when combined with other things. Within a part of this doctrine is a —

§ 1441. **Habit of Cruelty.** — “A habit,” said Dr. Lushington, “may be pleaded, not in cases of adultery only, but also in the case of cruelty.” And he added: “If you do not plead it generally, the party is deprived of the benefit of showing that for many years the course of conduct has been such as to lay a foundation for more specific acts.”<sup>1</sup> Partly as illustrative and partly to proceed further, —

§ 1442. **Wholly outside of Allegation.** — No one would question the proposition that what is in every view foreign to the averments is inadmissible. But we have just seen that the introduction of relevant evidence may make relevant another item which in the first instance would have been excluded. What gives color to specific cruelty proved, whether in extenuation or aggravation, is always admissible, and almost every case in the books is an illustration of this.<sup>2</sup> As once observed by a learned judge: “The attention cannot be confined to the particular act or acts alleged as a ground for a divorce, but the inquiry must necessarily involve the conduct of the parties to each other for the period during which it is alleged that the misconduct took place. It is not like the case of a bill for divorce for adultery or any other specific act, on the proof of which the complainant by law becomes entitled to a divorce, but the cruelty in most cases which gives cause for a divorce must be evidenced rather by general conduct than by particular acts. The act or acts alleged may be proved, but a divorce would not follow as a matter of course.” Yet he added: “We do not maintain that a single act of cruelty may not be evidence of so depraved a heart and be accompanied with such circumstances as would authorize a divorce; but we speak generally of cases for divorce on the ground of cruelty.”<sup>3</sup> Further as to which, —

§ 1443. **The Rule for Allegation and Proof** — was laid down in Alabama as follows: that specific acts of cruelty, not specifically alleged, cannot constitute the foundation for a divorce, yet they may be received as explanatory of those averred, and as

<sup>1</sup> *Wallscourt v. Wallscourt*, 11 Jur 134.

119 Mass. 290. Compare with *Graecen v.*

<sup>2</sup> *Whispell v. Whispell*, 4 Barb 217; *Reese v. Reese*, 23 Ala. 785; *Rayner v.*

*Graecen*, 1 Green Ch. 459.

*Rayner*, 49 Mich. 600; *Mayo v. Mayo*,

<sup>3</sup> *Scott, J.*, in *Doyle v. Doyle*, 26 Mo. 545, 546, 547. And see *Briggs v. Briggs*, 20 Mich. 34.

giving weight to them. The acts specified in the pleadings must be proved in substance as stated, but they need not be exactly in non-essential circumstances.<sup>1</sup> Said Goldthwaite, J.: "The strictest application of the rule does not require that more than the substance of the issue should be proved; and if the specification was that the defendant beat the complainant severely with a stick, while the evidence showed that it was done with a whip, the variance would be altogether immaterial. So, if the charge was that the violence was inflicted in different modes, only one of which was established, it would be enough; for the substance of the charge is that the particular violence offered amounted to cruelty, and the charge is supported by showing any violence of a like kind, which could be regarded as cruel within the meaning of the statute."<sup>2</sup>

§ 1444. **Time and Place.** — (**Allegation and Proof**). — The expositions of this subject in the adultery chapter<sup>3</sup> will be relevant here. In an English case the cruelty was charged as "in and during the months of April and May, 1861," and that proved was in June and July of the same year. Without inquiry whether or not this variance was material, the judge permitted the complaint to be amended.<sup>4</sup>

§ 1445. **Any Justification** — of acts of *prima facie* cruelty, growing out of the plaintiff's misconduct,<sup>5</sup> must be alleged and proved, it will not be presumed.<sup>6</sup>

### III. *The Evidence.*

§ 1446. **Already**, — in the last two sub-titles, and in the chapter on the law of cruelty in the first volume, we have seen almost the entire doctrine of the evidence.

§ 1447. **How much**. — The complaining party must establish in evidence so much of the alleged cruelty as constitutes ground of divorce; but he need not do more.<sup>7</sup>

<sup>1</sup> See, for the rule in other cases than divorce, 1 Bishop Crim. Proc. § 488 a-488 e.

<sup>2</sup> *David v. David*, 27 Ala. 222, 224. And see *Cole v. Cole*, 23 Iowa, 433. See also, as to a point of practice, *Breinig v. Breinig*, 26 Pa. 161.

<sup>3</sup> Ante, § 1336, 1337, 1340-1342, 1352-1356.

<sup>4</sup> *Bunyard v. Bunyard*, 32 Law J. N. S. Mat. 176.

<sup>5</sup> Vol. I. § 1640-1647.

<sup>6</sup> *Rumball v. Rumball*, Poynter Mar. & Div. 237, note; *Lockwood v. Lockwood*, 2 Curt. Ec. 281, 7 Eng. Ec. 114; *Shaw v. Shaw*, 2 Swab. & T. 515. And see *Williams v. Williams*, Law Rep. 1 P. & M. 178.

<sup>7</sup> *Lockwood v. Lockwood*, 2 Curt. Ec. 281, 7 Eng. Ec. 114; *Cole v. Cole*, 23 Iowa, 433.

§ 1448. **Marks of Violence and Declarations** — (*Res Gestæ*). — Marks of recent violence upon the complaining wife, and her declarations accompanying ill treatment from the husband, receivable as of the *res gestæ*,<sup>1</sup> are evidence of greater importance when the parties are not witnesses than when they are.<sup>2</sup> One proposition sustained by the adjudications is that where simply such marks are found upon the wife, the husband is not as of course presumed to have caused them.<sup>3</sup> But if she makes complaint of the injury *recenti facto*,<sup>4</sup> it, with the marks, may be shown; because from the nature of these transactions, unless such evidence were received, the husband might ill use his wife in the absence of witnesses, and she be left without possible redress. And if a wife complains *recenti facto* to her maid, and afterward but not *recenti facto* to her physician, still the latter complaint, though not direct evidence of ill usage, has been adjudged admissible as strengthening the statement and confirming the credit of the maid.<sup>5</sup> For, except under the modern statutes, the wife herself cannot be a witness<sup>6</sup> as in a criminal case. To illustrate, —

§ 1449. **Instance.** — Shortly after a wife left her husband's house, there were discovered upon her person severe bruises and injuries, caused, in the opinion of medical men, by external physical violence, and not by a fall or other accident. No complaint from her *recenti facto* appeared. Not even did she assign the husband's ill usage as the reason for her leaving. But it was

<sup>1</sup> For the doctrine of the *res gestæ* as held and applied in analogous cases, see 1 Bishop Crim. Proc. § 1083-1087, 1111, 1125; 2 *Ib.* § 625-627, 633.

<sup>2</sup> *Ante*, § 777-790.

<sup>3</sup> *Dysart v. Dysart*, 4 Rob Ec. 106, 118.

<sup>4</sup> "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are original evidence." 1 Greenl. Ev. § 102; *S. v. Howard*, 32 Vt. 380. Within which doctrine are complaints made immediately on violence inflicted. *Lambert v. P.* 29 Mich. 71; *Goodrich v. Goodrich*, 44 Ala. 670; *Berdell v. Berdell*, 80 Ill. 604.

<sup>5</sup> *Lockwood v. Lockwood*, 2 Curt. Ec. 281, 7 Eng. Ec. 114, 121; *Dysart v. Dysart*, 1 Rob. Ec. 106, 114, 470, 497. See *Waring v. Waring*, 2 Phillim. 132, 1 Eng.

Ec. 210, 213. And see further, on questions of this nature, *Reg. v. Walker*, 2 Moody & R. 212; *Rex v. Jagger*, 1 East, P. C. 455; *Reg. v. Osborne*, Car. & M. 622; *Phillips v. S.* 9 Humph. 246, 49 Am. D. 709; *C. v. McPike*, 3 Cush. 181, 50 Am. D. 727; *Kennard v. Burton*, 25 Me. 39, 43 Am. D. 249; *Anthony v. Smith*, 4 Bosw. 503; *Towle v. Blake*, 48 N. H. 92; *Taylor v. Grand Trunk Ry.* 48 N. H. 304, 2 Am. R. 229; *Henderson v. Crouse*, 7 Jones, N. C. 623; *Earl v. Tupper*, 45 Vt. 275; *Asbury Life Ins. Co. v. Warren*, 66 Me 523, 22 Am. R. 590.

<sup>6</sup> *Manchester v. Manchester*, 24 Vt. 649. But see *Melvin v. Melvin*, 58 N. H. 569, 42 Am. R. 605. Under various statutes she is admissible. *Matthai v. Matthai*, 49 Cal. 90; *Melvin v. Melvin*, *supra*; *Haley v. Haley*, 67 Cal. 24.



shown that on other occasions he had used violence toward her, and in other ways had so conducted as to create a strong presumption of his having inflicted the bruises and injuries: thereupon, her prayer being for alimony without divorce, it was granted. Said Spragge, V. C.: "She is seen with injuries upon her, inflicted by some person, not the result of accident. She left her husband's house suddenly, a short time, one or two days or more, before; her husband had previously struck her. I think the presumption is so strong that he, and not another person, inflicted these injuries that I do not hesitate to fix the act upon him." <sup>1</sup>

§ 1450. **Specially of Wife's Declarations.** — There are nice questions as to when, in these cruelty suits, the declarations of the wife may be admitted against the husband. Yet they involve no principles special to the divorce suit, and it is deemed best to dismiss them with a simple reference to cases.<sup>2</sup> In a husband's action for enticing away his wife, her declarations made just before and at the time of leaving him, indicating ill treatment, have been adjudged admissible for the defendant.<sup>3</sup>

§ 1451. **Demeanor after Suit brought.** — The English doctrine, derived from principles in a measure special to this offence, permits the demeanor of the parties subsequently to the bringing of the suit to be taken into the account, in determining whether or not a renewal of the cohabitation would be physically safe.<sup>4</sup> Such also is the doctrine in Georgia<sup>5</sup> and New Jersey.<sup>6</sup> But the Louisiana court held otherwise, observing: "The only question we have to examine is, whether the facts alleged as having occurred before the suit was brought are sufficient to justify a separation."<sup>7</sup> Undeniably those facts must be the ground of the proceeding,<sup>8</sup> yet one cannot see why they may not receive color

<sup>1</sup> *Jackson v. Jackson*, 8 Grant Ch. U. C. 499, 502, 504.

<sup>2</sup> *Johnson v. Sherwin*, 3 Gray, 374; *Cattison v. Cattison*, 22 Pa. 275; *Jacobs v. Whitcomb*, 10 Cush. 255; *Palmer v. Crook*, 7 Gray, 418; *Phillips v. Kelley*, 29 Ala. 628; *Berdell v. Berdell*, 80 Ill. 604; *Goodrich v. Goodrich*, 44 Ala. 670.

<sup>3</sup> *Gilchrist v. Bale*, 8 Watts, 355, 34 Am. D. 469. In the facts of this case, the wife when making the declarations showed on her person bruises which she said were inflicted by the husband. Among the cases

cited in this one are *Aveson v. Kinnaird*, 6 East, 188, and *Thompson v. Trevanion*, Skin. 402. A case not greatly dissimilar is *Bennett v. Smith*, 21 Barb. 439.

<sup>4</sup> *Westmeath v. Westmeath*, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238, 298; Vol. I. § 1534, 1535.

<sup>5</sup> *Johns v. Johns*, 29 Ga. 718.

<sup>6</sup> *Cook v. Cook*, 3 Stock. 195.

<sup>7</sup> *Tourné v. Tourné*, 9 La. 452, 457, Bullard, J.

<sup>8</sup> See *Ferrier v. Ferrier*, 4 Edw. Ch. 296.

as well from what occurred after the suit was brought as before.<sup>1</sup> Another disposition of this matter is to set it up in a supplemental complaint.<sup>2</sup>

§ 1452. **Confessions and Admissions**, — as evidence, are explained in another chapter.<sup>3</sup> And whether made “in words, or by the absence of the denial of charges which every innocent man would, if he could, deny with indignation,” they are, said Dr. Lushington, “important evidence;” being often “the best and most creditable testimony the *res gestæ* under the circumstances can admit of.”<sup>4</sup> Still, as in other divorce causes, alone and unaided they are not sufficient.<sup>5</sup>

§ 1453. **Letters**. — “Affectionate letters from a wife” to her husband “are not necessarily inconsistent with cruelty on the part of a husband; though they may be so, they are not necessarily so.”<sup>6</sup>

§ 1454. **Record in Criminal Case**. — We have already seen something of the effect in evidence of the record of another proceeding.<sup>7</sup> If one pleads guilty to an indictment, the record of the transaction is admissible against him in a civil suit, being a solemn judicial confession of the fact.<sup>8</sup> And on this principle, the record of a husband’s conviction for assault and battery upon his wife, pursuant to his plea of guilty, is good evidence against him in her divorce suit for the same cruelty.<sup>9</sup> On the other hand, if his plea to the indictment was not guilty, and the wife was a witness, the record of this conviction cannot be produced against him.<sup>10</sup> And where it did not affirmatively appear that the wife was a witness, the court rejected the record, since she might have been such.<sup>11</sup>

<sup>1</sup> Vol. I. § 1573; ante, § 1442.

<sup>2</sup> Cornwall v. Cornwall, 30 Hun, 573.

<sup>3</sup> Ante, § 707-729.

<sup>4</sup> Saunders v. Saunders, 1 Rob. Ec. 549, 558.

<sup>5</sup> Ayl. Parer. 229.

<sup>6</sup> Saunders v. Saunders, 1 Rob. Ec. 549, 565. And see Johns v. Johns, 29 Ga. 718.

<sup>7</sup> Ante, § 1406, 1407.

<sup>8</sup> 1 Greenl. Ev. § 537, note.

<sup>9</sup> Bradley v. Bradley, 2 Fairf. 367.

<sup>10</sup> Woodruff v. Woodruff, 2 Fairf. 475.

<sup>11</sup> Quinn v. Quinn, 16 Vt. 426. **Cases not for Divorce**. — In Connecticut, “in an action of book-debt,” says Swift, “the plaintiff claimed a right to recover for

articles delivered to the wife of the defendant, on the ground that by extreme cruelty and personal violence he had driven her from his house; and he offered in evidence of that fact the verdict of the jury convicting him in a public prosecution. But the court held that such verdict was not admissible evidence to prove that fact, and that verdicts in public prosecutions for crimes could never be evidence in civil suits, although the same question of fact should arise.” Swift’s Ev. 20. And see Maybee v. Avery, 18 Johns. 352; P. v. Buckland, 13 Wend. 592, 595; King v. Chase, 15 N. H. 9, 41 Am. D. 675; Glenn v. S. 46 Ind. 368; Bankston v. Folks, 38 La. An. 267.

§ 1455. **Proceedings to keep Peace.** — A husband, defending, cannot show an unsuccessful attempt by the wife to have him bound over to keep the peace. Said Black, J.: “She was not a party to it [the proceeding] in any sense that would make it binding on her. Nor does it appear to have any relation to the subject-matter of the present dispute.”<sup>1</sup>

§ 1456. *The Doctrine of this Chapter restated.*

Cruelty consists of a combination of specific acts and general temper and conduct, such in nature and degree as to render cohabitation physically unsafe to the innocent party. Hence the allegation of it should set out both classes, the former specifically and the latter in general terms. And the proofs must be relevant to and must cover the allegations of both classes. Each class of proofs will strengthen and give significance to the other. In addition whereto, the proofs of either class or both may be strengthened or rendered more significant and distinct, by other evidence of general or particular misconduct in the marriage, outside of the averments. But no such outside matter can constitute the foundation, either in whole or in part, of the divorce sentence. It can simply give character to the case as it appears in the averments and those proofs which are more direct thereto.

<sup>1</sup> Breinig v. Breinig, 26 Pa. 161, 164.

## CHAPTER XLIV.

## DESERTION.

- § 1457, 1458. Introduction.  
 1459-1469. The Allegation.  
 1470-1473. Locality of Act of Desertion.  
 1474-1499. The Evidence.  
 1500. Doctrine of Chapter restated.

§ 1457. **Elsewhere.** — A chapter in the first volume explains the law of this subject.<sup>1</sup> In this chapter, —

§ 1458. **How Chapter divided.** — We shall consider, I. The Allegation; II. The Locality of the Act of Desertion; III. The Evidence.

I. *The Allegation.*

§ 1459. **Offence Statutory.** — By the unwritten law, desertion is not a ground of divorce.<sup>2</sup> So that the proceeding is entirely statutory. Hence, —

§ 1460. **Covering Statutory Terms.** — The allegation must cover the terms of the particular statute, as required by the general rules of the law for pleadings on statutes.<sup>3</sup> We saw in the first volume that though our desertion Statutes differ in expression, their interpreted effect is nearly the same in all.<sup>4</sup> But one of the rules for constructing any pleading on a statute is that it must contain enough of the statutory words or their equivalents to identify it;<sup>5</sup> so that an allegation good upon one of these equivalent enactments is not necessarily so on another.<sup>6</sup> No full illustrations of these obvious propositions are here required, but the following will give distinctness to a part, —

§ 1461. **"Desertion"** — **"Wilful, Obstinate," &c.** — A statute making "wilful, obstinate, and continued desertion for the term of

<sup>1</sup> Vol. I. § 1653-1778.

<sup>4</sup> Vol. I. § 1664-1668.

<sup>2</sup> Vol. I. § 1660, 1664-1668.

<sup>5</sup> 1 Bishop Crim. Proced. § 612; Powell

<sup>3</sup> Ante, § 598 et seq.; Lord v. S. 17 v. Powell, 58 Mich. 299.

Neb. 526; 1 Bishop Crim. Proced. § 593-642.

<sup>6</sup> Ante, § 598, 614.

one year" a ground for divorce, differs little in practical effect, if at all, from one authorizing divorce for "wilful desertion," or even for "desertion" alone, during the same period.<sup>1</sup> But it will not suffice under the larger expression simply to charge the defendant with "wilful desertion for more than one year;" it shows nothing within the statute, because silent as to "obstinate."<sup>2</sup> Beyond which, —

§ 1462. **Particularize.** — The allegation must individualize and particularize the transaction so far as, by informing the defendant of what will be brought against him at the trial, to enable him to prepare his defence, thus fulfilling the ordinary requirements of good pleading.<sup>3</sup>

§ 1463. **Form of Allegation.** — A proper form of the allegation on the statute given in the section before the last would be —

That on, &c. at, &c. the respondent did wilfully and obstinately desert the libellant, and that thence continually he has deserted her down to the time of the filing of this libel, during the term of one year, and more.<sup>4</sup>

§ 1464. **General Formula.** — A general formula for the libel, to be filled with the particular statutory terms and facts, may be as follows. After averring the marriage,<sup>5</sup> and either before or after the jurisdictional allegations,<sup>6</sup> proceed: —

That after your libellant and the said X entered upon their cohabitation under the said marriage, the said X, on, &c. at, &c. deserted [*or* utterly deserted, *or* maliciously deserted, *or* deserted without justifiable cause, *or*, &c. employing the words of the statute] your libellant, and that he [*or* she] has thence until the present time, for three years and more, uninterruptedly continued the said desertion.

§ 1465. "**Désert,**" "**Deserted**" — **Qualifying Words.** — It is believed that the word "desert" or "deserted" conveys the full idea of the act of desertion, within the rule requiring the transaction to be individualized.<sup>7</sup> It is like "assault" in the criminal

<sup>1</sup> Vol. I. § 1665.

<sup>2</sup> *Phelan v. Phelan*, 12 Fla. 449.

<sup>3</sup> *Ante*, § 599; *Crawford v. Crawford*, 17 Fla. 180. See post, § 1465.

<sup>4</sup> And see *Stone v. Stone*, 10 C. E. Green, 445; *Cass v. Cass*, 4 Stew. Ch. 626; *Ward v. Ward*, 20 Wis. 252; *Kimball v. Kimball*, 13 N. H. 222; *Pinckney v. Pinckney*, 4 Greene, Iowa, 324; *Harris v. Harris*, 101 Ind. 498. **English Form.** — No rule of court in England, and so far as I can discover no decision, provides a

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form for desertion, but in *Browne & P. Div. Pract.* 615, I find the following non-official form: —

That the said John Jones, on or about the day of \_\_\_\_\_, A. D. 18 \_\_, deserted your petitioner without cause, and from thence hitherto without cause has left your petitioner destitute, and has kept and continued away for two years and upwards.

<sup>5</sup> *Ante*, § 604-611.

<sup>6</sup> *Ante*, § 589-595.

<sup>7</sup> *Ante*, § 1462.

law,<sup>1</sup> "commit adultery" in the criminal and divorce law,<sup>2</sup> and many other like things, where circumlocution adds nothing. Certainly, for example, desertion is no more a complicated affair, and no more varying with the cases, than adultery. The proofs of either of these offences will differ, but the offence is always the same, — the one being a purposed separation from a person named, the other a purposed conjunction with another person named. And such, so far as the author has been able to observe forms, is the common practice, equally in the adultery and desertion suits. All adjectives and other words qualifying "desertion," such as "wilful," "obstinate," "continued," "without consent," "without justifying cause," and the like, found in the statutes, should be repeated in the complainant's accusation. This sort of matter, being in the nature of a denial of any excuse for the desertion, need not be set out with a particularity exceeding the mere statutory words. Even an indictment is not required to expand the terms of a negation beyond those of the statute, and generally they may be more brief.<sup>3</sup>

§ 1466. "**Absented, without,**" &c. — A statute permitted divorce "when either party has absented himself or herself, without a reasonable cause, for the space of two years." And a husband's allegation under it that the wife, on a day named, left him, without any cause whatever on his part, and she has "been absent from him for more than two years," was adjudged inadequate. The reader perceives that it did not follow the language of the statute even in substance. "It is true," said Gamble, J., "that it is alleged that the wife left the plaintiff on the 20th of October, 1850, without any cause whatever, but the continued absence for two years is not connected with this departure, nor is it alleged that the continuance of the absence was without a reasonable cause."<sup>4</sup> In like manner, —

<sup>1</sup> 2 Bishop Crim. Proced. § 56, 57.

<sup>2</sup> Ante, § 1330.

<sup>3</sup> Bishop Stat. Crimes, § 1042-1044.

**Contrary View.** — In seeming contradiction of the doctrine of the text, Hemphill, C. J. once said in the Texas Court: "Where desertion without sufficient cause and against the consent of the other party is ground for divorce, it is not sufficient to state that the libellee unnecessarily and without sufficient cause abandoned the libellant; but the circumstances attend-

ing the desertion must be particularly stated, that the court may judge of the legal sufficiency of the complaint." And he added: "The plaintiff should state such facts as will show that the abandonment was really voluntary or without sufficient cause on the part of the [defendant] wife, and was the offensive desertion contemplated by the statute." *Hare v. Hare*, 10 Tex. 355, 359.

<sup>4</sup> *Freeland v. Freeland*, 19 Mo. 354.

§ 1467. "**Wilful and Malicious.**" — Under the statutory words "wilful and malicious desertion or absence by the husband or wife, without reasonable cause, for the space of two years," it was held that the libel must cover, in averment of the desertion, the idea conveyed by "wilful and malicious."<sup>1</sup> Likewise —

§ 1468. "**Three Years together.**" — Divorce being authorized "where the husband shall willingly absent himself from the wife for the space of three years together," an averment that the absenting was "more than three years ago" was adjudged inadequate, as not filling the statutory terms. For "all that is alleged in this libel may be true, and yet the husband may have never absented himself from the libellant for the space of a week since his intermarriage with her."<sup>2</sup>

§ 1469. **Prima-facie Case** — (**What Averments**). — Only what is *prima facie* adequate for divorce need be set out. Therefore, in Alabama, said Chilton, J., it is "sufficient for the bill to aver the marriage, that the complainant has resided in this State three years next before its exhibition, and that the husband has left her for the space of three years without the intention of returning." There is no need to add her readiness to receive him back to cohabitation.<sup>3</sup>

## II. *The Locality of the Act of Desertion.*

§ 1470. **In General**, — it is immaterial to any claim for divorce in what State, country, or county the act relied on transpired. But there are exceptional States and circumstances wherein this question becomes important.<sup>4</sup> Hereupon, —

§ 1471. **In Principle**, — if a married party in Massachusetts deserts the other, and a year afterward each removes to New Hampshire and both remain there three years, not less than a three years' desertion has taken place in New Hampshire.<sup>5</sup> And no reason appears why, in a variety of circumstances, there may not be deemed to have been a desertion in either of two localities, as may be necessary to sustain the jurisdiction. To pursue the question a little —

<sup>1</sup> *Stewart v. Stewart*, 2 Swan, Tenn.

591.

<sup>2</sup> *Hancock v. Hancock*, 5 N. H. 239,

240.

<sup>3</sup> *Gray v. Gray*, 15 Ala. 779, 782.

<sup>4</sup> *Ante*, § 160-163, 164-173.

<sup>5</sup> And see, for a case analogous, *ante*, § 1263.

§ 1472. **Further, in Principle.** — We should bear in mind that desertion consists of the non-cohabitation of the parties and the intent of the one to desert the other. Now, we saw in the first volume,<sup>1</sup> that these two things need not be simultaneous in origin; the separation may commence to-day and the desertion to-morrow or next year; consequently to constitute desertion the separation and the intent to desert must exist together the same on the second, third, and three hundredth day as on the first. As a question of evidence, when its existence is once shown, it is presumed to continue; but in law there is no difference between respective successive days or periods of the desertion. Therefore, when a party goes into a State, having been deserted by the other, a desertion as truly begins and is continued in the new State as if there had been none in the old. Whether or not the prior desertion can be counted, depends on a like principle as the question whether a prior adultery, after a broken condonation, can be made ground for divorce, — a question considered in an earlier part of this volume.<sup>2</sup>

§ 1473. **In Authority,** — the cases are not absolutely harmonious, nor are all quite satisfactory in their reasonings. Since the question does not often arise, it will suffice simply to refer to them, — the author not promising that there may not be a single one or two omitted.<sup>3</sup>

### III. *The Evidence.*

§ 1474. **Proved.** — The desertion must be affirmatively proved, *prima facie*, by the complaining party, and by competent and sufficient evidence.<sup>4</sup>

<sup>1</sup> Vol. I. § 1696, 1697.

<sup>2</sup> Ante, § 310 and connected sections.

<sup>3</sup> Frary v Frary, 10 N. H. 61, 32 Am. D. 395; Brett v. Brett, 5 Met. 233; Harteau v. Harteau, 14 Pick. 181, 25 Am. D. 372; Wells v. Thompson, 13 Ala. 793, 48 Am. D. 76; Sawtell v. Sawtell, 17 Conn. 284; McDermott's Appeal, 8 Watts & S. 251; Batchelder v. Batchelder, 14 N. H. 380; Kimball v. Kimball, 13 N. H. 222; Masten v. Masten, 15 N. H. 159; Hare v. Hare, 10 Tex. 355, 357; Harrison v. Harrison, 19 Ala. 499; Bishop v. Bishop, 30 Pa. 412; Ashbaugh v. Ashbaugh, 17 Ill. 476; Payson v. Payson, 34 N. H. 518;

Ford v. Ford, 2 Halst. Ch. 542; Hopkins v. Hopkins, 35 N. H. 474; Goodwin v. Goodwin, 45 Me. 377; Yates v. Yates, 2 Beasley, 280; Becket v. Becket, 17 B. Monr. 370; McCraney v. McCraney, 5 Iowa, 232, 68 Am. D. 702; Muller v. Hilton, 13 La. An. 1, 71 Am. D. 504; Goldbeck v. Goldbeck, 3 C. E. Green, 42; Frost v. Frost, 17 N. H. 251; Hick v. Hick, 5 Bush, 670.

<sup>4</sup> Bodwell v. Bodwell, 113 Mass. 314; Stone v. Stone, 10 C. E. Green, 445; Turney v. Turney, 4 Edw. Ch. 566; Rudd v. Rudd, 33 Mich. 101; Leaning v. Leaning, 10 C. E. Green, 241; Carter v. Carter, 62



§ 1475. **A Consent to the Separation** — would render it not, in law, desertion.<sup>1</sup> Still the just doctrine is that the applicant for divorce need not, as a part of his *prima facie* case, prove non-consent; for a cessation of cohabitation joined to an intent to desert, with nothing more, constitutes a *prima facie* desertion, and he who claims that this result was destroyed by an intervening consent must prove it.<sup>2</sup> Yet some of our statutes may be in terms to make non-consent an affirmative element in the desertion; and aside from them we have cases which favor the idea, but probably none which directly hold, that the plaintiff must show affirmatively an absence of the defendant's consent.<sup>3</sup> The words of a learned New Jersey chancellor are: "To establish a case of desertion, it should appear that the wife left her husband of her own accord, without his consent and against his will; or, that she obstinately refused to return, without just cause, on the request of her husband."<sup>4</sup> Yet if we assume the non-consent to be a part of the plaintiff's *prima facie* case, the result is not inevitable that he must affirmatively prove this negative, — a sort of question on which the books are not harmonious.<sup>5</sup>

§ 1476. **Presumed Continuance.** — A condition of facts once appearing is presumed to remain.<sup>6</sup> So that where the needful separation and intent to desert are established in evidence as of a particular date, their continuance day by day afterward need not be affirmatively proved; they will be presumed.<sup>7</sup> In the words of Dewey, J., spoken to a particular case: "The fact of her leaving him declaring her intention no longer to live with him being shown, her absence must be taken to be wilful, and being unexplained it must be taken to have been unjustifiable; and if no subsequent facts had been shown to qualify or excuse the continuance of the desertion, she would after five

Ill. 439; *Allen v. Allen*, 84 Ala. 367; *Osborn v. Osborn*, 17 Stew. Ch. 257.

<sup>1</sup> Vol. I. § 1671, 1690; *Simpson v. Simpson*, 31 Mo. 24; *Thompson v. Thompson*, 1 Swab. & T. 231.

<sup>2</sup> Vol. I. § 1671.

<sup>3</sup> *Thompson v. Thompson*, 1 Swab. & T. 231; *Smith v. Smith*, 1 Swab. & T. 359; *Jennings v. Jennings*, 2 Beasley, 38; *McGowen v. McGowen*, 52 Tex. 657.

<sup>4</sup> *Jennings v. Jennings*, *supra*.

<sup>5</sup> *Bishop Stat. Crimes*, § 1051, 1052.

<sup>6</sup> Vol. I. § 1125, 1126; *ante*, § 1238.

<sup>7</sup> *Bailey v. Bailey*, 21 Grat. 43; 1 Greenl. Ev. § 41, 42; *Gray v. Gray*, 15 Ala. 779. But see *Crossman v. Crossman*, 33 Ala. 486.

years have forfeited her marital rights, and subjected herself to a libel for divorce from the bonds of matrimony on the part of the husband." <sup>1</sup>

§ 1477. **Illustrations of Evidence.** — There is no one royal road over which the proofs in these cases must travel. Thus, —

§ 1478. **Contemporaneous Facts.** — The circumstances attending the separation,<sup>2</sup> the acts of the parties,<sup>3</sup> and their language uttered so near the time as to be a part of the transaction,<sup>4</sup> are severally admissible and commonly important. For example, the wife's declarations, made on the night of flying from her husband's house, are of the *res gestæ*,<sup>5</sup> and receivable in her favor.<sup>6</sup> So —

§ 1479. **Ordinary Treatment.** — The general course of the accused husband's treatment of his wife may be relevant.<sup>7</sup> And —

§ 1480. **The Confessions** — and declarations of the opposing party, made subsequently to the separation, are commonly serviceable.<sup>8</sup>

§ 1481. **Declining to Return** — to a suspended cohabitation may be regarded as desertion itself,<sup>9</sup> or as evidence of it.<sup>10</sup>

§ 1482. **Shutting off Return** — to such suspended cohabitation will take from the party who does it any right he may have acquired to treat the separation as a desertion by the other party.<sup>11</sup> "To entitle" a wife abandoned by her husband "to a divorce," said Chilton, J., "she must not by her conduct have driven him from her society, and have continuously denied him the *locus penitentiæ*, and the privilege of returning; for in that event we

<sup>1</sup> Hall v. Hall, 4 Allen, 39, 40.

<sup>2</sup> Kimball v. Kimball, 13 N. H. 222; McCoy v. McCoy, 3 Ind. 555; Rogers v. Rogers, 3 C. E. Green, 445; Reg. v. Cookham Union, 9 Q. B. D. 522.

<sup>3</sup> Salorgne v. Salorgne, 6 Mo. Ap. 603; Meldowney v. Meldowney, 12 C. E. Green, 328.

<sup>4</sup> Fulton v. Fulton, 36 Missis. 517, 527. S. v. Mertz, 14 Mo. Ap. 55. And see Bennett v. Smith, 21 Barb. 439. McGowen v. McGowen, 52 Tex. 657.

<sup>5</sup> Ante, § 1448.

<sup>6</sup> Cattison v. Cattison, 22 Pa. 275. And see Bealor v. Hahn, 117 Pa. 169.

<sup>7</sup> Graves v. Graves, 3 Swab. & T. 350; McCormick v. McCormick, 19 Wis. 172; Walter v. Walter, 117 Ind. 247.

<sup>8</sup> Word v. Word, 29 Ga. 281; McCoy v. McCoy, 3 Ind. 555.

<sup>9</sup> Vol. I. § 1697, 1705, 1707.

<sup>10</sup> Millar v. Millar, 8 P. D. 187; Bauder's Appeal, 115 Pa. 480. And see Vol. I. § 1774.

<sup>11</sup> Newing v. Newing, 18 Stew. Ch. 498, Bowlby v. Bowlby, 10 C. E. Green, 406; Taylor v. Taylor, 1 Stew. Ch. 207; Driver v. Driver, 1 Stew. Ch. 393; Salorgne v. Salorgne, 6 Mo. Ap. 603; Trall v. Trall, 5 Stew. Ch. 231; Thorpe v. Thorpe, 9 R. I. 57; Angier v. Angier, 63 Pa. 450; Rittenhouse v. Rittenhouse, 2 Stew. Ch. 274. And see Rudd v. Rudd, 33 Mich. 101; Muir v. Muir, 6 Scotch Sess. Cas. 4th ser. 1353.

must intend the separation was by her consent, in which case she is not entitled to a divorce.”<sup>1</sup>

§ 1483. **Unspoken Mind.**—In matter of law, a deserted party must stand ready to receive the other back, if the offer to return is made in good faith, not otherwise, at any time before the statutory period has fully run. But when the desertion has ripened into a ground for divorce, the day of repentance is ended, and the one in whom is the right may refuse.<sup>2</sup> Still it is a principle of our jurisprudence that no one is to suffer from a mere wish or mental purpose which is expressed neither in act nor word. In a Scotch case, the trial judge, unmindful of this principle of human justice, permitted the complaining woman while testifying for herself to be asked, “Would you be willing to return to your husband now?” Of course, as she had now acquired the legal right to refuse, she ought not to be prejudiced by her answer, which was, “I am not now willing to adhere to him if he is willing to take me back.” But looking at the case aside from this acquired right, Lord Young said in the Court of Session: “I do not like the question. . . . I do not like such questions being put. And I am not sure I should have allowed such a question myself. If I had allowed it, I think the discreet answer would have been, ‘If I had been asked, I should have taken time to consider my answer.’”<sup>3</sup> To cut off a party’s right on the strength of what either he or a third person surmised he might have done in imaginary circumstances, which never transpired, would be a most unfortunate antic in a court of justice.<sup>4</sup>

§ 1484. **A Record**—may in special circumstances be admissible in the desertion suit,<sup>5</sup> on principles explained in preceding chapters.<sup>6</sup>

§ 1485. **The Intent to Desert**,—always necessary to be proved,<sup>7</sup> is practically the fact of greatest difficulty in most of these cases. An intent, being an unseen condition of the mind, is equally in other than divorce issues as in them hard of proof, and circum-

<sup>1</sup> *Gray v. Gray*, 15 Ala. 779, 784, 785, *Gillinwaters v. Gillingwaters*, 28 Mo. 60.

<sup>2</sup> Vol. I. § 1705-1709, 1774, 1775.

<sup>3</sup> *Winchcombe v. Winchcombe*, 8 Scotch Sess. Cas. 4th ser. 726, 728.

<sup>4</sup> See post, § 1489; *Ford v. Ford*, 143 Mass. 577.

<sup>5</sup> *Miller v. Miller*, 150 Mass. 111;

*Bealor v. Hahn*, 117 Pa. 169; *Umlauf v. Umlauf*, 117 Ill. 580, 57 Am. R. 880; *Bauder's Appeal*, 115 Pa. 480.

<sup>6</sup> Ante, § 1403-1410, 1454, 1455.

<sup>7</sup> Vol. I. § 1670, 1671, 1687, 1688; *Friend v. Friend*, Wright, 639; *Brainard v. Brainard*, Wright, 354.

stantial evidence is the common resort therefor.<sup>1</sup> Simply to show a cessation of the cohabitation is far short of what the law demands.<sup>2</sup> The breaking off of the matrimonial living together may be obvious, but the intent must appear from all relevant facts.<sup>3</sup>

§ 1486. **In Brief**, — to quote from Shaw, C. J., a husband's desertion "may be proved by a great variety of circumstances, leading with more or less probability to that conclusion: as, for instance, leaving his wife with a declared intention never to return; marrying another woman, or otherwise living in adultery, abroad; absence for a long time, not being necessarily detained by his occupation or business, or otherwise;<sup>4</sup> making no provision for his wife, or wife and family, being of ability to do so; providing no dwelling or home for her, or prohibiting her from following him; and many other circumstances."<sup>5</sup> The central fact of the intent to desert is commonly an inference from what preceded, accompanied, and followed the separation.<sup>6</sup> In this way the court may even be made satisfied that the party leaving the matrimonial habitation is the deserted one, and the other who remains is the deserter.<sup>7</sup> It will be helpful to add here a brief statement of —

§ 1487. *Illustrative Cases*: —

**Getting rid of Shiftless Husband.** — It appeared in a wife's suit that "all her property," to quote from the report, was eight years before sold on execution to pay the husband's whiskey debts. "She removed to Cincinnati, and he lived with her most of the time drunk for several years, and doing no good, when she refused to support him any longer, and he left her house about five years ago. Her character<sup>8</sup> is, in general, good, but she has expressed a desire to be rid of her husband in order that she might marry some one else." The court said: "The wife has driven off her husband, and now seeks a divorce because of his *wilful* absence. She was doubtless right in refusing to live with or support a husband always drunk, but that does not make the case wilful absence on his part." So the petition was dismissed.<sup>9</sup>

<sup>1</sup> 1 Bishop Crim. Proc. § 1101, 1126.

<sup>2</sup> Cook v. Cook, 2 Beasley, 263; Crawford v. Crawford, 17 Fla. 180.

<sup>3</sup> Morrison v. Morrison, 20 Cal. 431, 432. And see McGowen v. McGowen, 52 Tex. 657; Mackenzie v. Mackenzie, 11 Scotch Sess. Cas. 4th ser. 105.

<sup>4</sup> Ahrenfeldt v. Ahrenfeldt. 1 Hoffman, 47; Vol. I. § 1693.

<sup>5</sup> Gregory v. Pierce, 4 Met. 478.

<sup>6</sup> Kimball v. Kimball, 13 N. H. 222; Bishop v. Bishop, 30 Pa. 412, 415.

<sup>7</sup> Graves v. Graves, 3 Swab. & T. 350.

<sup>8</sup> Ante, § 1424-1426.

<sup>9</sup> Hesler v. Hesler, Wright, 210.

§ 1488. **Refusing Reconciliation.** — A husband, having left his wife without just cause, proposed to her through a third person to be reconciled; which she declined, saying, she “had made up her mind not to live with him any longer.” When she afterward sued for a divorce, the court denied it, on the ground that her declaration showed her consent to the separation.<sup>1</sup>

§ 1489. **Return not desired.** — A husband collected all the wife’s property, converted it into money, and went back to Germany, the place of the marriage, never, he said, to return. She afterward expressed a wish that he never would return.<sup>2</sup> After he had been away the statutory period, without being heard from, she sustaining a good reputation, the court decreed a divorce on her prayer.<sup>3</sup> But —

§ 1490. **Desertion agreed to.** — Where, on a wife’s suit, the husband was shown to have left her for a distant place, saying he would not live with her; whereupon she followed him, came back, and stated that he was to pay her a certain sum and she to have a divorce; her prayer was refused, because, the transaction being contemplated as a whole, it amounted only to a separation by mutual agreement.<sup>4</sup>

§ 1491. **One Man not enough.** — A wife left her husband, saying she would not be confined to one man, and did not return. This was held to be desertion.<sup>5</sup>

§ 1492. **Original Refusing.** — Parties were married while the man was under arrest, on the woman’s complaint, for bastardy. He declined to live with her, and he was adjudged thereby to have deserted her.<sup>6</sup> So, —

§ 1493. **Other Cases.** — Where, in a wife’s suit, it appeared that some years after the marriage the husband left her and the children without any apparent cause, and remained away during the statutory period without contributing to her support;<sup>7</sup> where, without any known cause, the husband went off and had not been heard of;<sup>8</sup> where the husband sent the wife to her father’s, in a remote town, saying he would shortly follow her, but did not

<sup>1</sup> *Crow v. Crow*, 23 Ala. 583. Cases in line with this one, are *Newing v. Newing*, 18 Stew. Ch. 498; *Bauder’s Appeal*, 115 Pa. 480.

<sup>2</sup> Compare with ante, § 1483.

<sup>3</sup> *Guembell v. Guembell*, Wright, 226.

And see *Frarell v. Frarell*, Wright, 455.

<sup>4</sup> *Mansfield v. Mansfield*, Wright, 284.

<sup>5</sup> *Milliner v. Milliner*, Wright, 138.

<sup>6</sup> *McQuaid v. McQuaid*, Wright, 223.

<sup>7</sup> *White v. White*, Wright, 138.

<sup>8</sup> *Roberts v. Roberts*, Wright, 149.

for several months, and when he did he was with her only a brief period, then left her without in any way providing for or corresponding with her,<sup>1</sup>—in these several cases the desertion was held to be sufficiently proved. On the other hand, in a husband's suit, it being shown that, leaving his wife with a scanty supply, he went off for months to labor on the canal; returning, he found she had gone to her friends; she was overheard to say she would not live with him again,—the proof was deemed insufficient to establish desertion by her of him.<sup>2</sup>

§ 1494. **Shiftless and going off doctoring.**—It was shown on a wife's application that the husband, to quote from the report, was "frequently absent, and from sheer laziness wholly neglected to provide for his family. He was a physician, and went, as he said, 'doctoring about the country.' One time, when he had been gone several days and left no provision whatever for his family, she went to her father's, about eight miles off. When he returned and had learned where his wife was, instead of going for her, he left the country, and has since been absent more than three years, without contributing at all to the support of the wife, who continues to reside with her father." The divorce was decreed.<sup>3</sup> Again,—

§ 1495. **Drunken Husband Going away.**—A husband took to drink, neglected his family, became quarrelsome, then a vagabond. The parties disagreed, he left, was most of the time afterward drunk about the streets; she living by herself, supporting the family respectably, and maintaining a good reputation. Then he stole from her their little boy, said he meant to keep him, and not live with the family again. She had her divorce.<sup>4</sup>

§ 1496. **Leaving Place where deserted.**—A husband went from home intending to abandon his wife. She was poor, and returned to her former residence in another State. Within six months, he reappeared in the place where he deserted her, and found she had gone. The court held that it was not her duty to remain there, and granted the divorce prayed.<sup>5</sup>

§ 1497. **A like Case.**—A husband let his dwelling-house, as he announced, "with a view to a permanent separation." He

<sup>1</sup> Wyatt v. Wyatt, Wright, 149.

<sup>2</sup> Frarell v. Frarell, Wright, 455.

<sup>3</sup> Amsden v. Amsden, Wright, 66.

<sup>4</sup> Clark v. Clark, Wright, 225.

<sup>5</sup> Fishli v. Fishli, 2 Litt. 337. Divorce

for desertion was also decreed in Johnston v. Johnston, Wright, 454; and Thompson v. Thompson, Wright, 470.

The proof was held insufficient in Jones v. Jones, 13 Ala. 145.

directed the tenant to treat his wife well, and permit her to remain as long as she chose. The next day she left, and never went back. During the same week, and after her departure, he returned to the house, and continued to occupy it alone. These facts were deemed to show a desertion by him; there was an actual separation effected in pursuance of his intent to separate.<sup>1</sup>

§ 1498. **Breaking up House and going away.** — An embarrassed husband put his wife for a temporary sojourn into a family not his own, then went away promising to return soon. A fortnight afterward, she went back to their house, and found an execution in it. She wrote to him several letters, but got no answers. The furniture being sold, she went into lodgings; sent persons to him to induce him to return, but he said it was not convenient, he had debts to collect which would not permit. There was held to have been a desertion from the time of this refusal, though he once made a sort of vague offer to rejoin her, and four years later wrote her a letter in which he bade her “farewell forever.” Said Cresswell, J.: “He deserted the original home, and has provided no new one.”<sup>2</sup> But where the husband went away in search of employment, and the wife neglected to answer his letters, it was held that there was no desertion, though he did not return.<sup>3</sup>

§ 1499. **Willingness to be deserted.** — Let us recall the fundamental principle of human justice,<sup>4</sup> that a wish or thought which has manifested itself by no sign either in conduct or word cannot give or take away a legal right. Now, we may well imagine an excellent and affectionate wife, worn and exhausted by what ought to be the uncalled-for labor of supporting a worthless husband, or suffering daily and nightly abuse from him, or being obliged perpetually to witness his rascalities in every form, wishing, from the depths of her soul, to be deserted by him. Thereupon, should the wish lie concealed in her own breast, and should he abandon her without her consent, is she to be barred of her remedy of divorce? In reason, she is not. And the reader who consults the chapter on Desertion in the first volume, the chap-

<sup>1</sup> *Logan v. Logan*, 2 B. Monr. 142. See also *Hanberry v. Hanberry*, 29 Ala. 719.

<sup>2</sup> *Thompson v. Thompson*, 1 Swab. & T. 231.

<sup>3</sup> *Cudlipp v. Cudlipp*, 1 Swab & T. 229, 230.

<sup>4</sup> Ante, § 1483.

ters on Connivance and Collusion in this volume, and the present chapter, can hardly doubt that, at least, our American courts would not hold her to be barred. Yet there is an English case which, while it involved other inquiries, was decided against the wife chiefly, it would seem, on the ground of her unexpressed and not otherwise manifested willingness to be deserted. Said the Lord Chancellor: "There is nothing to satisfy the court that when the parties separated the husband went against the will of his wife.<sup>1</sup> On the contrary, there are circumstances in the case which induce the court to believe that it is extremely probable that they parted by mutual consent. It is shown that the respondent was a man of vile habits and bad temper, and treated the petitioner with great cruelty; and that, on one of the last occasions they were together, he told her he should leave her, and that she might walk the streets for a living." Thus the reasoning seems to have been that because he meant to desert her, and because he conducted so vilely as to induce any good woman to wish he would, therefore his desertion in fact was not desertion in law.<sup>2</sup> Happily, such is not the American reasoning.

§ 1500. *The Doctrine of this Chapter restated.*

The word "desert" carries within itself the full idea of the act and intent of a desertion. The proofs will vary with the cases, but the thing itself is always one, and the single word desert expresses it. Therefore the allegation need employ only this word, if it stands alone and without adjuncts in the statute. If the statutory word is any other, such as "abandon," "wilfully absent," or the like, it, and not "desert," must be used in allegation. The individualizing of the wrong charged, which is an element in all good pleading, is secured by the statement of the names of the parties, and of the time and place of the desertion. The evidence varies with the case. The proof of the cessation of the cohabitation, which is one part of the desertion, is commonly simple and direct. That of the intent to desert, which is the other part, is ordinarily and almost of necessity circumstantial. In it the difficulties chiefly lie. There is no one formula for their solution.

<sup>1</sup> Compare with ante, § 1475.

<sup>2</sup> *Smith v. Smith*, 1 Swab. & T. 359, 360, 361.



## CHAPTER XLV.

## OTHER SPECIFIC CAUSES OF DIVORCE.

- § 1501, 1502. Introduction.
- 1503, 1504. Habitual Drunkenness.
- 1505, 1506. Wilful Neglect.
- 1507-1509. Offering Indignities.
- 1510. Inhuman Treatment.
- 1511. Violent and Ungovernable Temper.
- 1512, 1513. Peace and Happiness.

§ 1501. **In the preceding Volume**, — there is a chapter of much greater length than the present one, on the specific causes for suspending or dissolving valid marriage other than adultery, cruelty, and desertion.<sup>1</sup> Not after any attempt at exact division, but in a general way, the law is there considered, while this chapter pertains to the procedure.

§ 1502. **Meagre** — though the elucidations of this chapter and the corresponding one of the last volume appear, practically they are reasonably full. For nearly all our divorce suits are under one or another of the three heads which furnish the titles for the last three chapters. The reader will perceive from the notes that the cases under our present composite title are few.<sup>2</sup>

§ 1503. *Habitual Drunkenness*:<sup>3</sup> —

**How the Allegation.** — Drunkenness consists of a habit, or continuous acts; so that on the ordinary principles of pleading, particularization is not necessary.<sup>4</sup> It is sufficient, if covering the words of the statute, to set out the drunkenness in general terms.<sup>5</sup> Thus, the statutory expression being “habitual intemperance,” a charge against the defendant of “habitual intemperance” was

<sup>1</sup> Vol. I. § 1779-1832.

<sup>2</sup> Vol. I. § 1779.

<sup>3</sup> For the law relating to this head, see Vol. I. 1781-1785.

<sup>4</sup> 1 Bishop Crim. Proced. § 494; Bishop Stat. Crimes, § 977, 978.

<sup>5</sup> Forney v. Forney, 80 Cal. 528.

held to be adequate, without further expansion. Added words could not, in the nature of the case, make it more informing.<sup>1</sup>

§ 1504. **The Evidence** — should cover and sufficiently sustain<sup>2</sup> the whole case; as, if the statute so requires, that the habit of drunkenness was contracted subsequently to the marriage.<sup>3</sup>

§ 1505. *Wilful Neglect*:<sup>4</sup> —

**Allegation — Finding.** — Under the California statute, there are two sets of facts which severally constitute “wilful neglect.” Therefore because the complaint must identify the statute,<sup>5</sup> a wife’s simple charge against her husband of “wilful neglect” is not adequately specific. Nor will a finding in terms outside of the allegations suffice.<sup>6</sup>

§ 1506. **“Grossly, Wantonly, and Cruelly.”** — If the statute qualifies the husband’s “refusal or neglect” by these words, and they are set down in the complaint, the circumstances proving them are admissible in evidence without specifying items or acts.<sup>7</sup>

§ 1507. *Offering Indignities*:<sup>8</sup> —

**How the Allegation.** — An “indignity” is not, like an “adultery” or a “desertion,” a single and well-defined act, which is the same under all surroundings, but it is one or more of uncounted numbers of different acts, which may severally or collectively constitute an indignity or not according to the circumstances of the particular case.<sup>9</sup> Consequently, though it is adequate in pleading to say that the defendant “did commit adultery” or “did desert,”<sup>10</sup> it is not enough to charge that he “did commit an indignity.” There must be a sufficient specification of acts and circumstances to make apparent the matrimonial wrong of the statute.<sup>11</sup> Thus, —

§ 1508. **Instances.** — Under the statutory words if “either party shall offer such indignities to the other as shall render his or her condition intolerable,” the simple averment that the respondent offered the petitioner indignities which rendered his condition

<sup>1</sup> Burns v. Burns, 13 Fla. 369, 376.  
And see Golding v. Golding, 6 Mo. Ap. 602.

<sup>2</sup> McGonegal v. McGonegal, 46 Mich. 66.

<sup>3</sup> Vol. I. § 1784; Lewis v. Lewis, 75 Iowa, 200.

<sup>4</sup> For the law of this offence, see Vol. I. § 1788-1802.

<sup>5</sup> Ante, § 1460.

<sup>6</sup> Devoe v. Devoe, 51 Cal. 543.

<sup>7</sup> Brown v. Brown, 22 Mich. 242.

<sup>8</sup> For the law under this head, see Vol. I. § 1826-1828.

<sup>9</sup> Vol. I. § 1828.

<sup>10</sup> Ante, § 1330, 1465.

<sup>11</sup> Erwin v. Erwin, 4 Jones Eq. 82; Miller v. Miller, 14 Mo. Ap. 418; Brown v. Brown, 38 Ark. 324. See Griffith v. Griffith, 89 N. C. 113.

intolerable was adjudged inadequate.<sup>1</sup> Even the specified indignity that the respondent accused the complainant of adultery was held to come short, because not denying the truth of the charge.<sup>2</sup>

§ 1509. **The Proofs** — were considered in a case not requiring elucidation.<sup>3</sup> Under the title Cruelty, the principal doctrines both of law and procedure in this offence are stated.

§ 1510. *Inhuman Treatment* : —

**Offence and Allegation.** — An Iowa statute authorizes divorce at the suit of the wife, if the husband “is guilty of such inhuman treatment as to endanger her life.”<sup>4</sup> Threats importing danger, with little or no violence actually inflicted, may constitute this wrong.<sup>5</sup> The form of the allegation is within the rule just stated under the head of “Indignities.”<sup>6</sup> It will not suffice simply to charge that the defendant is guilty of such inhuman treatment as to endanger the plaintiff’s life. Said Dillon, J.: “The fact showing, or from which the court can see, that the life would be endangered by a continuance of the cohabitation should be fully set forth.”<sup>7</sup>

§ 1511. *Violent and Ungovernable Temper* : —

**How Allege.** — Under the statutory words “habitual indulgence of violent and ungovernable temper,” it is inadequate to aver that the defendant “habitually indulges in a wilful and ungovernable temper, to such an extent that complainant cannot live with him in peace.” Not only is there here a departure from the terms of the statute, but there is an omission of essential matter which it implies. There should be an express charge that the ill temper of the husband was “towards the wife. It is no cause of divorce that he indulges in such temper towards others not in his family, in her presence.”<sup>8</sup> Moreover, there should be some specifying of leading facts within the general allegation, not necessarily descending to details which the witnesses will rehearse.<sup>9</sup>

§ 1512. *Peace and Happiness* : —

**Offence.** — If it is a statutory ground for divorce “that the parties cannot live together in peace and happiness, and that their welfare requires a separation,” not they, but the court, must judge of their peace and happiness, and determine whether or not

<sup>1</sup> Bowers v. Bowers, 19 Mo. 351.

<sup>2</sup> Huckabay v. Huckabay, 35 Tex. 620.

<sup>3</sup> Edmond’s Appeal, 57 Pa. 232.

<sup>4</sup> Freerking v. Freerking, 19 Iowa, 34,

<sup>5</sup> Sackrider v. Sackrider, 60 Iowa, 397.

<sup>6</sup> Ante, § 1507.

<sup>7</sup> Freerking v. Freerking, supra.

<sup>8</sup> Phelan v. Phelan, 12 Fla. 449, 452.

<sup>9</sup> Burns v. Burns, 13 Fla. 369, 378.

a divorce is the law's remedy for a breach thereof. "The public," said Wright, C. J., "has an interest in these cases, and the parties cannot be their own judges, but the court decides where so many interests are involved."<sup>1</sup> Hence, —

§ 1513. **Allegation.** — The setting out of the wrong must follow the rule we have just been considering.<sup>2</sup> It is not enough to aver simply that the parties "cannot live in peace and happiness together, and that their welfare requires a separation." Facts must be stated from which the court can deduce the legal result that the applicant is entitled to a divorce. Moreover, said Greene, J.: "The petition should also show, *prima facie*, that complainant is the injured party, in order to admit proof of these essential facts."<sup>3</sup>

<sup>1</sup> *Lyster v. Lyster*, 1 Iowa, 130. Illustrative facts authorizing divorce are stated in *Inskeep v. Inskeep*, 5 Iowa, 204, 217.

<sup>2</sup> Ante, § 1507, 1510, 1511.

<sup>3</sup> *Pinkney v. Pinkney*, 4 Greene, Iowa, 324, 326.

## BOOK XIII.

## THE SENTENCE AND ITS FORCE AND STABILITY.

## CHAPTER XLVI.

## THE RENDITION, CONTENTS, AND VACATING OF THE SENTENCE.

§ 1514. Introduction.

1515-1520. Steps to Sentence.

1521-1528. Contents of Sentence, with Record.

1529-1537. Opening and Vacating.

1538. Doctrine of Chapter restated.

§ 1514. **How Chapter divided.** — We shall consider, I. The Steps preliminary to the Sentence; II. The Contents of the Sentence, including something of the Record; III. Opening and Vacating the Sentence.

*I. The Steps preliminary to the Sentence.*

§ 1515. **The Preceding Expositions** — of this volume relate chiefly to the steps whereby a cause is carried forward to its conclusion, which, if favorable to the plaintiff, is a sentence of divorce. So that already this sub-title has been substantially filled up. In the other connections also, we have some mere mention,<sup>1</sup> without much explanation, of the modern step of the —

§ 1516. **Decree Nisi** — (**England**). — This preliminary to the closing sentence originated in England. It was among the provisions of the statutes which enlarged the divorce jurisdiction,

<sup>1</sup> For example, Vol. I. § 1824; ante, § 360, 955.

and transferred it from the ecclesiastical to the temporal courts.<sup>1</sup> By construction, it was not limited to future cases, but was applied equally to suits pending.<sup>2</sup> This decree *nisi* does not alone dissolve the marriage, it is simply a step thereto.<sup>3</sup> The dissolution comes with the further decree which makes this one absolute, and then the whole proceeding has a sort of retrospective operation to break the *vinculum* as from the time when the decree *nisi* was rendered.<sup>4</sup> For other questions of practice under this decree the reader is referred to the English books.<sup>5</sup>

§ 1517. **Decree Nisi with us.** — The decree *nisi*, differing more or less from the English, has to some extent, yet not at the time of this writing very widely, been introduced into our practice. But we have hitherto no such legislation, and no such helpful decisions, as to render a text-writer's elucidations of it particularly desirable. The reader, therefore, is simply referred to some cases.<sup>6</sup>

§ 1518. **Changing Decree during Term.** — The rule is general, in causes civil and criminal, that at any time during the term of the court at which a judgment is rendered, it may be recalled or modified as the judge shall direct; but when the term has ended, it is too late.<sup>7</sup> This practice may be made available in

<sup>1</sup> Vol. I. § 153 and note. The chief provisions on this subject are 23 & 24 Vict. c. 144, § 7; 29 Vict. c. 32, § 3; 36 Vict. c. 31.

<sup>2</sup> Watton v. Watton, Law Rep. 1 P. & M. 227.

<sup>3</sup> Noble v. Noble, Law Rep. 1 P. & M. 691; Hulse v. Hulse, Law Rep. 2 P. & M. 259; Norman v. Villars, 2 Ex. D. 359; Wickham v. Wickham, 6 P. D. 11; Halfen v. Boddington, 6 P. D. 13.

<sup>4</sup> Prole v. Soady, Law Rep. 3 Ch. Ap. 220.

<sup>5</sup> See, among other cases, Boulton v. Boulton, 2 Swab. & T. 405; Stoate v. Stoate, 2 Swab. & T. 384; Lewis v. Lewis, 2 Swab. & T. 394; Latham v. Latham, 2 Swab. & T. 299, overruled in Ellis v. Ellis, 8 P. D. 188; Forster v. Forster, 3 Swab. & T. 151; Stone v. Stone, 3 Swab. & T. 212; Bowen v. Bowen, 3 Swab. & T. 530; Clements v. Clements, 3 Swab. & T. 394; Palmer v. Palmer, 4 Swab. & T. 143; Dering v. Dering, Law Rep. 1 P. & M. 531; Patterson v. Patterson, Law Rep. 2 P. & M. 192; Hulse v. Hulse, *supra*;

Fitzgerald v. Fitzgerald, Law Rep. 3 P. & M. 136; M. v. B. Law Rep. 3 P. & M. 200; Ousey v. Ousey, 1 P. D. 56; S. v. B. 9 P. D. 80.

<sup>6</sup> Garnett v. Garnett, 114 Mass. 347, 379; Sparhawk v. Sparhawk, 116 Mass. 315; Fox v. Davis, 113 Mass. 255, 18 Am. R. 476; Moors v. Moors, 121 Mass. 232; Wales v. Wales, 119 Mass. 89; Peaslee v. Peaslee, 147 Mass. 171; Brigham v. Brigham, 147 Mass. 159; Oliver v. Oliver, 20 Mo. 261; Lawrence v. Lawrence, 73 Ill. 577.

<sup>7</sup> 1 Bishop Crim. Proced. § 1298; Harrison v. S. 10 Misso. 686; Ramsour v. Raper, 7 Ire. 346; Danforth v. Danforth, 105 Ill. 603; Hair v. Moody, 9 Ala. 399; McRaven v. McGuier, 9 Sm. & M. 34; Neale v. Caldwell, 3 Stew. 134; Acre v. Ross, 3 Stew. 288. See further, on this general matter, Brookfield v. Morse, 7 Halst. 331; Taylor v. Starr, 2 Root, 293; Patton v. Massey, 2 Hill, S. C. 475; Wilkerson v. Goldthwaite, 1 Stew. & P. 159; Hickman v. Barnes, 1 Misso. 156.

the divorce suit, without resorting to other principles to be explained further on.<sup>1</sup> At the same time, —

§ 1519. **When takes Effect — (Record).** — A divorce sentence is operative from the day of its rendition,<sup>2</sup> even though the clerk postpones the entering of it until afterward. And should the party die before the record is made up, still on being made up it will be good.<sup>3</sup> But —

§ 1520. **A mere Verdict,** — or other finding of the facts, not supplemented by the judicial decree, cannot be construed into a divorce.<sup>4</sup> And we have just seen that even the addition of the decree *nisi* leaves the marriage in full force.<sup>5</sup>

## II. *The Contents of the Sentence, including Something of the Record.*

§ 1521. **In General of Sentence.** — Both in natural propriety and in juridical reason, the sentence should be an embodiment, in direct words, of the determination of the court upon the combined pleadings and the admitted and proven facts, when all have been duly produced by the parties, passed upon by the jury if necessary, and considered by the judge. What will flow from the sentence as of law ought not to be inserted in it; for the court has no control over such a matter, and an attempted determination thereof would be simply an extra-jurisdictional impertinence. But the conclusion of the law upon the established facts, and the response of the judicial discretion to whatever is for it, should, as settled by the court, appear in the sentence.<sup>6</sup> Thus, —

§ 1522. **Dower.** — Some of our statutes give the wife dower on a dissolution of the marriage for the husband's fault, — not on the fault itself, but on the divorce therefor. Plainly, therefore, it would be vain and extra-jurisdictional for the decree to declare her right to dower, and contrary to law to deny it. But if the statute permitted her to have dower at the discretion of the

<sup>1</sup> *R. v. R.* 20 Wis. 331, 335; *Carley v. Carley*, 7 Gray, 545.

<sup>2</sup> *Alt v. Banholzer*, 39 Minn. 511, 12 Am. St. 681.

<sup>3</sup> *In re Cook*, 77 Cal. 220.

<sup>4</sup> *Clark v. Cassidy*, 64 Ga. 662. And

see *Dillon v. S.* 6 Tex. 55 *Oades v. Oades*, 6 Neb. 304.

<sup>5</sup> Ante, § 1516.

<sup>6</sup> As partly illustrative, *Schmidt v. Schmidt*, 26 Mo. 235.

court, she could not recover it unless the decree gave it her. Again,—

§ 1523. **Forbidding to Remarry.**—If the statute forbids the party for whose fault a divorce is declared to remarry,<sup>1</sup> plainly the court cannot with effect introduce into the decree a clause permitting him.<sup>2</sup> But Chancellor Walworth used always to insert the prohibiting clause, as being, to quote his own words, “necessary in order to prevent him from imposing upon others, who might suppose he was capable of contracting matrimony if the decree was general.”<sup>3</sup> This care for foolish spinsters, to whom it was presumed the man would be showing the judicial record of his own adulteries as the inducement to marry him, is admirable in philanthropy. But it is quite aside from the function of a legal judgment to notify third persons of what all are presumed to know, the contents of the statute-book of the State. There is no pretence that the clause is of any legal validity, or in any way essential to the complete efficacy of the divorce sentence. And it is not believed to be common.

§ 1524. **Record — (Sentence).**—The sentence becomes a part of the record, but it is not the whole. The record properly recites (and so are such records as the author has had the opportunity of seeing) the libel, the citation or appearance or both, the other pleadings, and the findings of fact on the issues presented. Then follows the sentence. As to some particulars,—

§ 1525. **Citation and Appearance** — If the record discloses an appearance, it need not show also a citation; because, after an appearance, it has become immaterial whether there was a citation or not. But if a divorce is decreed on default, then, at least in principle, the citation or order of notice by publication, and its due execution, should be stated.<sup>4</sup> So much would seem to be necessary to the *prima facie* regularity of the suit.

§ 1526. **Jurisdiction Presumed.**—When the record is made up, and it is to be used in another court of the same or another State, the tribunal rendering it being, as in divorce cases it must be in nearly all our States, a superior one of record, the jurisdiction

<sup>1</sup> Vol. I. § 703-705.

<sup>2</sup> Barber v. Barber, 16 Cal. 378.

<sup>3</sup> Graves v. Graves, 2 Paige, 62, 63.

<sup>4</sup> Consult, on this sort of question, Floyd v. Black, Litt. Sel. Cas. 11; Crabb v. Atwood, 10 Ind. 331, Innerarity v.

Byrne, 5 How. U. S. 295; Newcomb v. Dewey, 27 Iowa, 381; Enos v. Smith, 7 Sm. & M. 85; Harris v. Lester, 80 Ill. 307; Rumfelt v. O'Brien, 57 Mo. 569; U. S. v. Yates, 6 How. U. S. 605; Northcut v. Lemery, 8 Or. 316.



will be presumed;<sup>1</sup> unless the want of it affirmatively appears, then it will not be.<sup>2</sup>

§ 1527. **The Marriage**, — we have seen in various connéctions,<sup>3</sup> is among the issues in every divorce suit; it must be alleged, proved, and found by the tribunal as a fact. But it is perceived that the record, before the sentence is reached, if made up as just stated, contains all this matter. So that a repetition of the marriage in the sentence would seem not to be required.

§ 1528. **The Proofs** — which moved the court to its decree need in no case appear of record.<sup>4</sup>

### III. *Opening and Vacating the Sentence.*

§ 1529. **In the Ecclesiastical Law**, — a sentence against the validity of a marriage has been said never to be final, but to be always open to revision and reversal.<sup>5</sup> So, among other places, it is stated in the famous Duchess of Kingston's case.<sup>6</sup> We have an illustration of this in the old doctrine that if after a nullity sentence for impotence the alleged impotent person marries and has children, the sentence will be vacated and the second marriage made void.<sup>7</sup> But —

§ 1530. **Doctrine doubtful**. — Such is unquestionably the canon law. And it was widely assumed by text-writers, some judges con-

<sup>1</sup> Consult *Huntington v. Charlotte*, 15 Vt. 46; *Grignon v. Astor*, 2 How. U. S. 319; *Bank of United States v. Merchants Bank*, 7 Gill, 415; *Cassidy v. Leitch*, 2 Abb. N. Cas. 315; *Wilson v. Wilson*, 18 Ala. 176; *Grey v. McNeal*, 12 Ga. 424.

<sup>2</sup> Consult *S. v. Armington*, 25 Minn. 29; *Bannon v. P.* 1 Bradw. 496; *Miller v. Snyder*, 6 Ind. 1; *Seely v. Reid*, 3 Greene, Iowa, 374. Contrary in part to the text, we have in a Massachusetts case the following *dictum* "by the court." The subject under consideration was a California certificate of divorce, which the party had inconsiderately presented instead of the record. "Although a court of record," — that is, the California court, — says the *dictum*, "its jurisdiction over the subject of divorce is a special authority not recognized by the common law, and its proceedings in relation to it stand on the same footing with those of courts of limited and inferior jurisdiction; so that its pow-

ers in the case must be shown and appear to have been strictly pursued." *C. v. Blood*, 97 Mass. 538, 540. In line with this *dictum* is *Northcut v. Lemery*, 8 Or. 316.

<sup>3</sup> For example, ante, § 604–611, 732–734.

<sup>4</sup> *Hawes v. Hawes*, 33 Ill. 286, 289.

<sup>5</sup> *Poynter Mar. & Div.* 157; *Shelf Mar. & Div.* 474; *Oughton tit.* 306. And see *Robins v. Crutchley*, 2 Wils. 118, 122, 127; *Bowzer v. Ricketts*, 1 Hag. Con. 213, 214; *Morris v. Webber*, 2 Leon. 169; *Meadows v. The Duchess of Kingston*, Amb. 756; *Barrs v. Jackson*, 1 Y. & Col. C. C. 585, 598.

<sup>6</sup> *Duchess of Kingston's Case*, 20 How. St. Tr. 355, 420, which pages compare with p. 406, 442, 443, 450, 451, 506, 507, 530.

<sup>7</sup> Vol. I. § 282 and note; *Morris v. Webber*, 2 Leon. 169.

curing, to have been likewise the law of the ecclesiastical tribunals. Yet its being canon law could not alone make it ecclesiastical.<sup>1</sup> The books disclose no modern acting upon the doctrine. And we have utterances from some of the ecclesiastical judges indicating that they would have denied it had occasion arisen. Thus, Sir John Nicoll, speaking of nullity for impotence, said: "By the canon law, the marriage is not absolutely dissolved; the parties are separated; and if the church is deceived, the former marriage is to be renewed; and if a second marriage is contracted, it becomes null and void. What a state to place the parties in! This is something in the text-law which I cannot readily assent to belong to the law of this country."<sup>2</sup> So, in a later case, Sir Herbert Jenner Fust intimated in like manner the opinion that even on direct proceedings, the nullity sentence can be set aside only for fraud or collusion. "According to your argument," he said to counsel, "every child and every child's child may bring a suit to have the sentence reversed; they will equally be strangers; I do not see where it is to stop."<sup>3</sup> Now,—

§ 1531. **With us**,—less right of intervention is recognized than was permitted in the ecclesiastical practice,<sup>4</sup> and the ecclesiastical dogma of indissolubility is rejected. Yet upon these two pillars—the wide liberty of third persons to intervene in marriage suits,<sup>5</sup> and the non-destructibility of the matrimonial union—rests whatever doctrine is derivable from the authorities referred to in the last two sections. So that, lacking either the old or any new support for the doctrine, we have not the doctrine itself. No recognition of it appears in our reports, and it is contrary to the spirit of our law.<sup>6</sup> Should we accept it, still by its terms it is restricted to the nullity suit; it in no view embraces that for the dissolution of valid marriage or for divorce from bed and board. With us, and generally in England,—

§ 1532. **Conclusive**.—In every species of litigation, on whatever subject, the judgment of a court within its jurisdiction, not on its face void, is in the absence of fraud, after the tribunal has risen for the term<sup>7</sup> and after the periods for new trials, writs of error,

<sup>1</sup> Vol. I. § 104–109.

<sup>2</sup> Norton v. Seton, 3 Phillim. 147, 1 Eng. Ec. 384, 387.

<sup>3</sup> Meddowcroft v. Huguenin, 3 Curt. 417. Ec. 403, 414, 7 Eng. Ec. 438, 444. And see Sopwith v. Sopwith, 2 Swab. & T. 160.

<sup>4</sup> Ante, § 535.

<sup>5</sup> Ante, § 533.

<sup>6</sup> And see Hoffman v. Hoffman, 30 Pa.

<sup>7</sup> Ante, § 1518.

and other rehearings have elapsed, and likewise before except by these methods, conclusive between the parties, — not inquiring now what is the rule as to privies and third persons.<sup>1</sup> Specially as to —

§ 1533. **Divorce Judgments.** — There are excellent reasons why judgments in matrimonial causes, whether of nullity, dissolution, or separation, should be more stable, certainly not less, than in others, and so our courts hold. The matrimonial status of the parties draws with and after it so many collateral rights and interests of third persons, that uncertainty and fluctuation in it would be greatly detrimental to the public. And particularly to an innocent person who has contracted a marriage on faith of the decree of the court, the calamity of having it reversed, and the marriage made void, is past estimation. These considerations have great weight with the courts, added whereto there are statutes in some of the States according a special inviolability to such judgments.<sup>2</sup> Still, —

§ 1534. **In General, of Rehearings.** — Not speaking now of fraud, which is for the next chapter, in the absence of such legislation, the American tribunals have in general been governed by substantially the same principles in divorce causes as in others, in opening decrees or granting new trials, writs of error, or *certiorari*; or otherwise, according to the practice of the court, re-examining the question; except that there has always been a manifest reluctance to disturb a final judgment of divorce, especially after a

<sup>1</sup> *Birckhead v. Brown*, 5 Sandf. 134; *Sheldon v. Newton*, 3 Ohio St. 494; *Castle v. Noyes*, 4 Kern. 329; *Stewart v. Nune-maker*, 2 Ind. 47; *Whitewater Valley Canal v. Henderson*, 3 Ind. 3; *Evarts v. Gove*, 10 Vt. 161; *Wyman v. Campbell*, 6 Port. 219, 31 Am. D. 677; *Wright v. Marsh*, 2 Greene, Iowa, 94; *Johnson v. Thaxter*, 7 Gray, 242; *Clarke v. Lott*, 11 Ill. 105; *Warburton v. Aken*, 1 McLean, 460; *Swiggart v. Harber*, 4 Scam. 364, 39 Am. D. 418; *Le Grange v. Ward*, 11 Ohio, 257; *Bridges v. Nicholson*, 20 Ga. 90; *Hampson v. Weare*, 4 Iowa, 13, 66 Am. D. 116; *Olds v. Glaze*, 7 Iowa, 86; *Jackson v. Patrick*, 10 S. C. 197; *Mosseaux v. Brigham*, 19 Vt. 457; *Shaw, C. J.* in *Greene v. Greene*, 2 Gray, 361, 364.

<sup>2</sup> *Gilruth v. Gilruth*, 20 Iowa, 225; *Moster v. Moster*, 53 Mo. 326; *Cox v. Cox*, 19 Ohio St. 502, 2 Am. R. 415; *Tappan v. Tappan*, 6 Ohio St. 64; *Woolley v. Woolley*, 12 Ind. 663; *Salisbury v. Salisbury*, 92 Mo. 683; *Waldo v. Waldo*, 52 Mich. 94; *Hansford v. Hansford*, 34 Mo. Ap. 262; *Nave v. Nave*, 28 Mo. Ap. 505. In Kentucky, the Court of Appeals has no power to reverse a decree granting a divorce. *Maguire v. Maguire*, 7 Dana, 181; *Thornberry v. Thornberry*, 4 Litt. 251; *Bogges v. Bogges*, 4 Dana, 307; *Whitney v. Whitney*, 7 Bush, 520. See also *Woolley v. Woolley*, 12 Ind. 663; *McQuigg v. McQuigg*, 13 Ind. 294; *Ewing v. Ewing*, 24 Ind. 468; *Owens v. Sims*, 3 Coldw. 544; *Smith v. Smith*, 20 Mo. 166; *Hopkins v. Hopkins*, 40 Wis. 462. And see *Watkinson v. Watkinson*, 12 B. Monr. 210. Further elucidations appear post, c. 48.

second marriage, involving the interests of third persons. The practice differs in the States, so that a minute examination of it would not accord with the plan of these volumes.<sup>1</sup> But —

§ 1535. **Care for Third Persons.** — Whatever the form of reviewing the cause after final decree, the court will to the extent of its power protect innocent third persons from injury by the reversal. For example, under the former chancery practice in New York, after a husband had obtained a dissolution on process irregularly served, and had married again, the divorced wife on application was permitted to come in and defend the suit, but for the protection of the other woman the Chancellor ordered that the original decree remain in force until the result of the litigation should be reached. "In the mean time," he said, "the second marriage has rights."<sup>2</sup> Of course, no step vacating a decree of this nature should be taken without notice to the opposite party.<sup>3</sup> And after a divorce on default where a citation filling the requirements of the law had been given, the default should not be set aside, since the plaintiff may have remarried.<sup>4</sup>

§ 1536. **Party acting on Decree.** — If a party has used the privileges of a decree of divorce, he has thereby affirmed it, and he is too late to complain of its burdens.<sup>5</sup> On this principle, where

<sup>1</sup> Ante, § 678-686; *Mumford v. Mumford*, 13 R. I. 19; *Bostwick v. Bostwick*, 73 Tex. 182; *Miller v. Miller*, 13 Stew. Ch. 475; *Zoellner v. Zoellner*, 46 Mich. 511; *Spangler v. Spangler*, 19 Bradw. 28; *Waite v. Waite*, 18 Bradw. 334; *Lawrence v. Lawrence*, 73 Ill. 577, *Burge v. Burge*, 88 Ill. 164, *Olin v. Hungerford*, 10 Ohio, 268; *Piatt v. Piatt*, 9 Ohio, 37; *Laughery v. Laughery*, 15 Ohio, 404; *Johnson v. Johnson*, Walk. Mich. 309; *Smith v. Smith*, 4 Paige, 432, 27 Am. D. 75; *Colvin v. Colvin*, 2 Paige, 385, 22 Am. D. 644; *Dunn v. Dunn*, 4 Paige, 425; *Bourne v. Simpson*, 9 B. Monr. 454; *Jeans v. Jeans*, 3 Harring. Del. 136; *Bogges v. Bogges*, 4 Dana, 307; *Evans v. Evans*, 5 B. Monr. 278; *Lucas v. Lucas*, 3 Gray, 136; *Sheafe v. Sheafe*, 9 Post. N. H. 269; *Smith v. Smith*, 20 Mo. 166; *Hoffman v. Hoffman*, 30 Pa. 417; *Mansfield v. Mansfield*, 26 Mo. 163; *Tappan v. Tappan*, 6 Ohio St. 64; *Watson v. Watson*, 47 How. Pr. 240, 1 Hun, 267, 3 Thomp. & C. 667; *Bamford v. Bamford*, 4 Or. 30; *Brown v.*

*Brown*, 58 N. Y. 609; *Holmes v. Holmes*, 63 Me. 420; *Walker v. Walker*, 42 Ala. 489; *Holbrook v. Holbrook*, 114 Mass. 568; *Fries v. Fries*, 1 McAr. 291; *Breinig v. Breinig*, 26 Pa. 161; *Willman v. Willman*, 57 Ind. 500; *Phelps v. Phelps*, 7 Paige, 150; *Andrews v. Andrews*, 15 Iowa, 423; *Edson v. Edson*, 108 Mass. 590, 11 Am. R. 393; *Comstock v. Adams*, 23 Kan. 513, 33 Am. R. 191; *Childs v. Childs*, 11 Mo. Ap. 395; *Hemphill v. Hemphill*, 38 Kan. 220.

<sup>2</sup> *Dunn v. Dunn*, 4 Paige, 425, 430. See also *Young v. Young*, 17 Minn. 181.

<sup>3</sup> *Bowman v. Bowman*, 64 Ill. 75. And see *Haggerty v. Phillips*, 21 La. An. 729.

<sup>4</sup> *Davis v. Davis*, 30 Ill. 180, 184. And see *Lewis v. Lewis*, 15 Kan. 181; *Rouse v. Rouse*, 47 Iowa, 422; *Whiting v. Whiting*, 114 Mass. 494; *Brown v. Brown*, 59 Ill. 315

<sup>5</sup> *Bourne v. Simpson*, 9 B. Monr. 454. And see *Gaines v. Gaines*, 9 B. Monr. 295, 48 Am. D. 425; Vol. I. § 1460

a man appealing from a sentence dissolving his marriage married again, his appeal was dismissed; for by the marriage he had affirmed the validity of the divorce. Besides, to permit him to prosecute his appeal would be an injustice to his innocent second wife.<sup>1</sup>

§ 1537. **Reversal on Mutual Request.**—After the rendition of a dissolution decree for the wife's alleged adultery, the husband made a sworn declaration that he had become convinced of her innocence; and both prayed that the enrolment be opened and vacated, and the decree reversed. Thereon the court dismissed the suit, but without prejudice to intervening rights of third persons. A further prayer was that the bill and all the papers be taken from the files and destroyed. This was refused because of possible intervening rights; but "the register is directed to seal up the pleadings and proceedings, together with the master's report, and not to suffer them to be copied or inspected, except by the special permission of the court." It was deemed that if the husband was mistaken in thinking his wife innocent, still the law favors condonation.<sup>2</sup>

§ 1538. *The Doctrine of this Chapter restated.*

The sentence is the court's expression of its final determination of the question litigated. It is made a part of the record, which also states the foundation of proceedings and fact whereon the sentence rests. In the absence of fraud, it can be reversed only on direct steps taken in the court for that purpose, at the time and progressing in the manner which the law and the practice of the particular tribunal have pointed out. The judge, when applied to after the close of the term, will to the extent of his authority give such direction to the case as will injure third persons having interests as little as possible. During the term, he has a general authority to modify the sentence, not departing from what the law has prescribed for it. The extent and manner of interference after the term has closed are not uniform in our States, and in all the interference is much restricted.

<sup>1</sup> Stephens v. Stephens, 51 Ind. 542;  
Garner v. Garner, 38 Ind. 139.

<sup>2</sup> Colvin v. Colvin, 2 Paige, 385, 386,  
22 Am. D. 644.

## CHAPTER XLVII.

## FRAUD IN THE PROCEEDINGS AND SENTENCE.

- § 1539, 1540. Introduction.  
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§ 1539. **The Difficulties** — of the subject of this chapter, not unlike fraud in marriage,<sup>1</sup> when approached simply through the judicial *dicta* and the decisions combined therewith, are great. But they diminish as we extend our view through the wider field of the law, and call forward the helpful fundamental principles of our jurisprudence.

§ 1540. **How Chapter divided.** — We shall consider, I. The General Doctrines of the Subject; II. As between the Parties; III. As to Third Persons; IV. The Nature of the Fraud.

I. *The General Doctrines of the Subject.*

§ 1541. **Vitiating Quality of Fraud.** — It is a general principle of the law that every transaction into which fraud enters, however solemn in form, is, to employ the word common in the books, void.<sup>2</sup> But connected with and limiting this principle are others; namely, that —

§ 1542. **Only Sufferer complain.** — No one is entitled to institute in a court of justice any form of complaint for any wrong unless he can show an injury to himself therefrom.<sup>3</sup> And within this rule it is not sufficient that the public, of which body he

<sup>1</sup> Vol. I. § 452.

<sup>2</sup> Bishop First Book, § 66-69, 124, 125; *Lowry v. McMillan*, 8 Pa. 157, 49 Am. D. 501; *Stell v. Glass*, 1 Ga. 475.  
<sup>3</sup> Bishop Non-Con. Law, § 22, 26, 33, 37.

is one, has suffered, he must prove an injury special to himself.<sup>1</sup> So that —

§ 1543. **A Fraudulent Divorce Sentence**, — however liable to be overturned by a party or an injured third person,<sup>2</sup> will not be inquired into on the application of one whose rights are not specially affected by it.<sup>3</sup> Therefore, —

§ 1544. **Voidable**. — Considering the loose, shifting, and somewhat uncertain meanings of the words “void” and “voidable,”<sup>4</sup> the latter, as applied to a fraudulent judgment, is on the whole the more accurate.<sup>5</sup> But —

§ 1545. **No Jurisdiction**. — A divorce sentence rendered without jurisdiction in the tribunal is absolutely, in the full meaning of the word, void. So that this defect may be taken advantage of in any proceeding, direct or collateral, by a party to it, or any other person.<sup>6</sup> The question presents itself in many aspects and forms, but always with the one result, as the numerous cases cited in the notes to this section and the other sections therein referred to disclose.

§ 1546. **The Distinction** — between fraud and the non-jurisdiction of the tribunal, whereby the former renders the judgment in the appropriate sense voidable and the latter void, is founded as well in natural and juridical reason as in the decisions. If a court entertains a cause over which the law gives it no authority, the consequence is not otherwise than if the members of a debating club did the same thing. The docket entry of it is void, so likewise is each subsequent step therein, therefore so is the judgment, and so the combined whole. But where the

<sup>1</sup> Bishop Non-Con. Law, § 71; 1 Bishop Crim. Law, § 264, 265.

<sup>2</sup> Post, § 1565.

<sup>3</sup> Terhune v. Colton, 2 Stock. 21; Ruger v. Heckel, 85 N. Y. 483, 484; Webster v. Webster, 54 Iowa, 153. And see Simmons v. Simmons, 52 Hun, 551; Humphries v. Bartee, 10 Sm. & M. 282.

<sup>4</sup> Vol. I. § 254; Bishop Con. § 610-622.

<sup>5</sup> Earle v. Earle, 91 Ind. 27; Miltimore v. Miltimore, 40 Pa. 151, 153, Thompson, J. And see Succession of Weigel, 18 La. An. 49.

<sup>6</sup> Ante, § 4, 5, 182-184; Miltimore v. Miltimore, 40 Pa. 151; Westerwelt v. Lewis, 2 McLean, 511; Boynton v. Foster, 7 Met. 415; Smith v. Knowlton, 11 N. H. 191;

Jones v. Jones, 3 Dev. 360; Fitzhugh v. Custer, 4 Tex. 391, 51 Am. D. 728; Towns v. Springer, 9 Ga. 130; Mobley v. Mobley, 9 Ga. 247; Swiggart v. Harber, 4 Scam. 364, 39 Am. D. 418; Hammond v. Wilder, 25 Vt. 342; Wyatt v. Judge, 7 Port. 37; Camden v. Mulford, 2 Dutcher, 49; Martin v. Carron, 2 Dutcher, 228; Carron v. Martin, 2 Dutcher, 594, 69 Am. D. 584; Stoughton v. Mott, 13 Vt. 175; Stamps v. Newton, 3 How. Missis. 34; Fisher v. Harnden, 1 Paine, 55, Summar v. Jarrett, 3 Baxter, 23; Friedlander v. Loucks, 34 Cal. 18; Ginn v. Rogers, 4 Gilman, 131; Long v. Long, Morris, 381; Beverly v. Burke, 9 Ga. 440, 54 Am. D. 351; Neff v. Beauchamp, 74 Iowa, 92.

court has jurisdiction, each act is a judicial one; and an act wrongly done because the judge mistook the law, or because either innocently or fraudulently he was misled by a party as to a fact, is still judicial; and the record of it, if appearing right on its face, can be removed only by a judicial order, to obtain which the law's steps must be pursued. And the law does not permit anything to be done in any judicial tribunal,<sup>1</sup> therefore does not permit a docket entry or a record obtained by fraud to be vacated, on the application of a mere intermeddler, who has no interest in the question. The minuter details of the doctrine will occupy us through the remainder of this chapter.

## II. *As between the Parties.*

§ 1547. **Reversal of Proceedings.** — Fraud is one of the grounds for setting aside the verdict, the finding of the court on the facts, or the sentence, and in proper circumstances ordering a new hearing, within the elucidations<sup>2</sup> of the last chapter,<sup>3</sup> — this ground being there reserved for consideration here.

§ 1548. **Mutual Fraud,** — of which the common instance is collusion,<sup>4</sup> and which is available to third persons in interest, as we shall see in the next sub-title, cannot be brought forward by either of the parties against the other as ground for reversing any step in the cause or vacating the sentence.<sup>5</sup> This doctrine is an inevitable result from the universal rule of our law that one in a court of justice cannot complain of his own wrong, or of another's wrong whereof he was a partaker.<sup>6</sup> It would be a special novelty for a plaintiff to address the tribunal with, "The defendant and I have been playing a trick on this court, but I discover that he has got the better of me, so please turn the tables on him." Yet —

<sup>1</sup> Ante, § 1542.

<sup>2</sup> Ante, § 1529-1537.

<sup>3</sup> Edson v. Edson, 108 Mass. 590, 11 Am. R. 393; Sanford v. Head, 5 Cal. 297; Rogan v. Walker, 1 Wis. 631; U. S. v. Throckmorton, 98 U. S. 61; De Graw v. De Graw, 7 Mo. Ap. 121; Campbell v. Strong, Hemp. 265; Newcomb v. Dewey, 27 Iowa, 381; Nickerson v. Nickerson, 16 Philad. 154.

<sup>4</sup> Ante, § 249, 255.

<sup>5</sup> Prudham v. Phillips, 2 Amb. 763; Allen v. Maclellan, 12 Pa. 328, 51 Am. D. 608, 609; Greene v. Greene, 2 Gray, 361, 362, 365. I think the expression of Campbell, J. in Friend v. Friend, 53 Mich. 543, 544, 51 Am. R. 161, was not meant by him as a denial of this doctrine. And see post, § 1563.

<sup>6</sup> Ante, § 344, 345, and authorities there cited.



§ 1549. **Defrauded Party.** — When, in the course of the proceedings or at the sentence, a fraud has been practised on the court by one party to the injury of another who is innocent, the latter, if he acts with due promptness, may have the step — commonly the sentence — vacated or annulled. Some illustrations of which doctrine will now be given; thus, —

§ 1550. **Vacating Sentence.** — In Pennsylvania, a man against whom had been rendered a divorce sentence applied soon afterward to the court to have it vacated on the ground that his wife had obtained it by fraud. She was now out of the State, but notice of the application was served at her “reputed place of residence” within the State. Thereupon an order annulling the sentence was in her absence passed. On a collateral suit, involving the question of the validity of this woman’s marriage to a second husband after the divorce and before the annulment, this order was held to have made the divorce sentence in law void. The authority chiefly relied on was *Prudham v. Phillips*.<sup>1</sup> “The principle,” observed Gibson, C. J., “is a general one, and applicable alike to ecclesiastical sentences and common-law judgments. It has no relation to the doctrine of amendments, which make the record speak a language it did not speak before; the vacation is a new and independent judgment, of which the recorded entry is its appropriate evidence. . . . It may be an arbitrary act to expunge a sentence of divorce with a stroke of the pen, bastardize after-begotten children, involve an innocent third person in legal guilt, and destroy rights acquired in reliance on a judicial act which was operative at the time; and under this first impression I would have decided as did the judge at *nisi prius*. But the legitimate husband has his rights; and if any one must suffer from the invalid marriage, it is he who procured it. By the terms of the contract he took the lady for better, for worse; and, having assumed at least her moral responsibilities, he stands as to hardship in her place. He, therefore, has no right to complain.”<sup>2</sup> This case is open to criticism as to some of its details, especially as to the sufficiency of the —

§ 1551. **Notice.** — It is a principle fundamental equally in our

<sup>1</sup> *Prudham v. Phillips*, cited Amb. 763, Greene, 2 Gray, 361, 61 Am. D. 454, 41 Harg. Law Tracts, 456, note. Am. Law Reg. 42, and an article 4 Am.

<sup>2</sup> *Allen v. Maclellan*, 12 Pa. 328, 331, Law Reg. 1.  
332, 51 Am. D. 608. See Greene v.

jurisprudence and in natural justice that no step shall be taken against any person without actual notice when possible, or constructive when the actual cannot be given.<sup>1</sup> For example, in a South Carolina case, not of divorce, yet as authoritative to this question as if it had been, it was held that a judgment will not be set aside on motion without notice to the plaintiff or his representatives. Said the learned judge: "The judgment of a court would be worse than useless, if, where no imputation of the want of jurisdiction over the subject was made, the judgment, after it had been recorded, and even satisfied, might be revoked and abrogated without notice to the party in whose favor it was rendered."<sup>2</sup> But—

§ 1552. **With Notice, this Proceeding authorized.**—Where the proper notice was given, the right to exercise this power has, since the Pennsylvania case was decided, become firmly established in our American practice.<sup>3</sup>

<sup>1</sup> Ante, § 25, 140-142, 182; Bishop First Book, § 24.

<sup>2</sup> *Ingram v. Belk*, 2 Rich. 111, 112, opinion by Wardlaw, J.

<sup>3</sup> *Johnson v. Coleman*, 23 Wis. 452, 99 Am. D. 193; *Weatherbee v. Weatherbee*, 20 Wis. 499; *Crouch v. Crouch*, 30 Wis. 667; *Boyd's Appeal*, 38 Pa. 241; *Singer v. Singer*, 41 Barb. 139; *True v. True*, 6 Minn. 458; *S. v. Whitcomb*, 52 Iowa, 85; *Holmes v. Holmes*, 63 Me. 420; *Binsse v. Barker*, 1 Green, N. J. 263, 23 Am. D. 720; *Adams v. Adams*, 51 N. H. 388, 12 Am. R. 134, which case see for a pretty full collection of the authorities; *Earle v. Earle*, 91 Ind. 27; *Brown v. Grove*, 116 Ind. 84, 9 Am. St. 823; *Wisdom v. Wisdom*, 24 Neb. 551, 8 Am. St. 215; *Olmstead v. Olmstead*, 41 Minn. 297; *Stephens v. Stephens*, 62 Tex. 337; *Britton v. Britton*, 18 Stew. Ch. 88; *Boyd's Appeal*, 38 Pa. 246; *Bryant v. Austin*, 36 La. An. 808; *McMurray v. McMurray*, 67 Tex. 665; *Everett v. Everett*, 60 Wis. 200; *Firmin v. Firmin*, 16 Philad. 75; *Bomsta v. Johnson*, 38 Minn. 230; *Caswell v. Caswell*, 120 Ill. 377, 24 Ill. Ap. 548; *Gechter v. Gechter*, 51 Md. 187; *Fidelity Ins. Co.'s Appeal*, 93 Pa. 242. In *Edson v. Edson*, 108 Mass. 590, 597, 11 Am. R. 393, *Bigelow*, C. J. said: "We believe it to be an established principle of jurisprudence that courts of justice have power, on due pro-

ceedings had, to set aside or vacate their judgments and decrees, whenever it appears that an innocent party without notice has been aggrieved by a judgment or decree obtained against him without his knowledge, by the fraud of the other party. Nor is this principle limited in its operation to courts which proceed according to the course of the common law. It is equally applicable to courts exercising jurisdiction in equity, and to tribunals having cognizance of cases which are usually heard and determined in the ecclesiastical courts. In tribunals of the last-named description, whose decrees cannot be revised by writ of error or review, the proper form of proceeding is by petition to vacate the former decree as having been obtained by fraud upon the party and imposition upon the court." And for this he referred to *Parker v. Dee*, 3 Swanst. 529; *Kemp v. Squire*, 1 Ves. Sen. 205; *Roach v. Garvan*, Ib. 157; *Stevens v. Guppy*, Turn. & R. 178; *Richmond v. Tayleur*, 1 P. Wms. 734, 736; *Loyd v. Mansell*, 2 P. Wms. 73; *Shelf. on Mar. & Div.* 475; *Conway v. Beazley*, 3 Hag. Ec. 639, 642; *Prudham v. Phillips*, Amb. 763, 20 How. St. Tr. 479, note; *Jackson v. Jackson*, 1 Johns. 424; *Dunn v. Dunn*, 4 Paige, 425; *Story Conf. Laws*, § 547; 2 Kent Com. (11th ed.) 109. Leaving now the citations of the learned Chief-Justice,

§ 1553. **Delay**—in the application,<sup>1</sup> by one having notice of the fraud, will, unless satisfactorily explained, operate to the prejudice of the applicant, and if unreasonably continued it will bar his right.<sup>2</sup> But—

§ 1554. **The Death**—of the defrauding party, without unreasonable delay by the other, will not prevent a vacating of the sentence.<sup>3</sup> And—

§ 1555. **A Marriage**—to an innocent person will not defeat this proceeding.<sup>4</sup>

§ 1556. **Same Court and Cause.**—As general doctrine, to which in some of the States there is the exception about to be stated, the proceeding for annulling the decree must be in the same court and cause wherein it was rendered,<sup>5</sup> and where remains the record which is to be vacated. Such has been the practice in most of the cases.<sup>6</sup> For example, the defrauded party cannot maintain an original suit against the other for a divorce and rescission of the fraudulent sentence. And Shaw, C. J., in announcing such to be the opinion of the court, said “that a decree of divorce *a vinculo*, where no appeal, review, or writ of error is allowed by law, or when the time for bringing such review or writ of error has expired, is final and conclusive upon the parties, and that an original proceeding to set it aside, on the ground that it was fraudulently obtained, upon false evidence, cannot be maintained.”<sup>7</sup> Yet in a subsequent case expressly not overruling this, the same tribunal held that a divorce decree may be vacated on summary petition, if obtained by false testimony on a libel notice of which

perhaps there are some mere *dicta* contrary to the text; as, in *Greene v. Greene*, 2 Gray, 361, 61 Am. D. 454, and *Parish v. Parish*, 9 Ohio St. 534, 75 Am. D. 482. But the decisions themselves, while differing in one or two minor things, are as to the matter of the text harmonious. Of the like sort is *Dobbins v. McNamara*, 113 Ind. 54, not a divorce case. In Missouri, the statute is regarded as explicit against this right. *Salisbury v. Salisbury*, 92 Mo. 683.

<sup>1</sup> Ante, § 412-429.

<sup>2</sup> *Caswell v. Caswell*, 24 Ill. Ap. 548, 120 Ill. 377; *Nicholson v. Nicholson*, 113 Ind. 131; *Firmin v. Firmin*, 16 Philad. 75; *Perry v. Perry*, 15 Philad. 242; *Everett v. Everett*, 60 Wis. 200, *Delan-*

*cey v. Brownell*, 4 Johns. 136; *Singer v. Singer*, 41 Barb. 139; *Nichols v. Nichols*, 10 C. E. Green, 60.

<sup>3</sup> *Bomsta v. Johnson*, 38 Minn. 230; *Brown v. Grove*, 116 Ind. 84, 9 Am. St. 823; *Boyd's Appeal*, 38 Pa. 241; *Johnson v. Coleman*, 23 Wis. 452, 99 Am. D. 193.

<sup>4</sup> Ante, § 1535, 1550; *Caswell v. Caswell*, 24 Ill. Ap. 548; *Bomsta v. Johnson*, 38 Minn. 230; *Everett v. Everett*, 60 Wis. 200; *Stephens v. Stephens*, 62 Tex. 337.

<sup>5</sup> *De Graw v. De Graw*, 7 Mo. Ap. 121; *Parish v. Parish*, 9 Ohio St. 534, 75 Am. D. 482.

<sup>6</sup> Consult the cases cited in ante, § 1550, 1552.

<sup>7</sup> *Greene v. Greene*, 2 Gray, 361, 367, 61 Am. D. 454.

the defendant was prevented by the other's fraud from receiving.<sup>1</sup> Still, —

§ 1557. **Equity** — has a well-known, and it is believed universally accepted, jurisdiction in proper cases to *enjoin a party* from setting up a judgment at law, and among them are cases in which it was obtained by fraud. But the decree operates only *in personam*, on the party, and not on the judgment itself, which it does not undertake to declare void.<sup>2</sup> This doctrine would seem to be applicable as well to a divorce sentence as to any other. But our equity tribunals and jurisdictions are, under the varying practice of our States, greatly mixed. In some, something like this equity proceeding is followed in respect of divorce judgments, — the minuter distinctions as to which it is not deemed best to attempt here to define.<sup>3</sup> But it does not occur to the author that outside of some not well-considered words of judges, any distinct conflict is discoverable between the doctrines of this section and the last.

§ 1558. **Annul or Open.** — Leaving now this equity practice, we have the further question on which we seem not to have much direct judicial enlightenment, whether the proper function of the annulling order is simply to vacate the sentence, while the case remains open for the parties to proceed therein if they wish, or whether it operates on the entire record and ends the cause. On principle, if the fraud consisted in making a jurisdiction falsely appear,<sup>4</sup> the annulling order must in terms or interpretation

<sup>1</sup> *Edson v. Edson*, 108 Mass. 590, 11 Am. R. 393. Perhaps not all the *dicta* in these two cases harmonize, certainly there is no conflict in the decisions. Yet it has been suggested that the latter overrules the former. For example, Bigelow, in his "Overruled Cases," puts *Greene v. Greene*, thus: "*Overruled*. *Edson v. Edson*, Bristol, MSS. *Denied*. *Adams v. Adams*, 51 N. H. 388, 12 Am. R. 134; *Singer v. Singer*, 41 Barb. 139; *Wortman v. Wortman*, 17 Abb. Pr. 66. See *Ex parte Smith*, 34 Ala. 455, 457. But see *Parish v. Parish*, 9 Ohio St. 534, 75 Am. D. 482." And to *Parish v. Parish*, he has the word "*denied*," referring to some of these cases and to "*Boyd's Appeal*, 38 Pa. 241; *Allen v. Maclellan*, 12 Pa. 328, 51 Am. D. 608; *Reel v. Elder*, 62 Pa. 308. But see *Greene v. Greene*, 2 Gray, 361, 61

Am. D. 454." Big. Ov. Cas. 368. As the question should be viewed in that sort of book, possibly he may be right, but not so ought it to be treated in a text-book.

<sup>2</sup> 2 Story Eq. Jur. § 1570 et seq.; *Dobson v. Pearce*, 2 Kern. 156, 168, 62 Am. D. 152; *Evans v. Spurgin*, 11 Grat. 615; *Gifford v. Thorn*, 1 Stock. 702; *Dobson v. Pearce*, 1 Duer, 142; *Allison v. Chapman*, 19 Fed. Rep. 488.

<sup>3</sup> *Ex parte Smith*, 34 Ala. 455; *Harrison v. Harrison*, 19 Ala. 499; *McQuigg v. McQuigg*, 13 Ind. 294; *McCraney v. McCraney*, 5 Iowa, 232, 68 Am. D. 702; *McMurray v. McMurray*, 67 Tex. 665; *Sanford v. Head*, 5 Cal. 297, referring to *Wright v. Miller*, 1 Sandf. Ch. 103, 120; *Reigal v. Wood*, 1 Johns. Ch. 401.

<sup>4</sup> Ante, § 1545; *Caswell v. Caswell*, 120 Ill. 377.

extend to the whole proceeding, leaving nothing for the parties to go on with. So, if one of the parties is dead,<sup>1</sup> the case is ended. And there are other like circumstances leading to the same result. But if there is a jurisdiction, and the parties are living and before the court, the annulling order can in just legal practice reach back only to where the fraud began. Thus, —

§ 1559. **Fraud in Citation.** — If, the court having a proper jurisdiction, the applicant for divorce made it by a fraud appear, contrary to the fact, that there had been a due citation duly served on the respondent, whereby for want of an appearance the case had gone to a decree on default, simply the steps subsequent to the petition should be annulled, leaving the decree vacant, and permitting the respondent to come in and defend. And this is understood to be the common course in such a case.<sup>2</sup>

§ 1560. **The Procedure** — is disclosed, to a considerable extent, in the cases just cited to the last section. There may be undecided questions, and it will vary somewhat with the general practice of the court, to which it ought to conform.<sup>3</sup> We have seen that notice must be given to the opposing party.<sup>4</sup> So the petition on which the judgment vacating the decree is to be rendered must fully and specifically set out the particular fraud relied upon.<sup>5</sup> And —

§ 1561. **The Evidence,** — because of the grave consequences of annulling the decree, must be absolutely clear and conclusive.<sup>6</sup> Admissions of the party are within the rule which renders them in divorce causes, and while unsupported, inadequate.<sup>7</sup>

§ 1562. **Temporary Alimony** — may, in circumstances justifying it, and according to the principles laid down in our chapters on that subject, be allowed the wife on this proceeding.<sup>8</sup>

<sup>1</sup> Ante, § 687, 1554.

<sup>2</sup> *Britton v. Britton*, 18 Stew. Ch. 88; *Crouch v. Crouch*, 30 Wis. 667, 669, 670 (where the forms and procedure are pretty fully given); *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Rush v. Rush*, 46 Iowa, 648; *Holmes v. Holmes*, 63 Me. 420; *Adams v. Adams*, 51 N. H. 388, 12 Am. R. 134; *Edson v. Edson*, 108 Mass. 590, 11 Am. R. 393; *Doughty v. Doughty*, 12 C. E. Green, 315, 1 Stew. Ch. 581; *Stephens v. Stephens*, 62 Tex. 337.

<sup>3</sup> Vol. I. § 138, 139, 147; ante, § 461, 465.

<sup>4</sup> Ante, § 1551.

<sup>5</sup> Ante, § 1252; *Groff v. Groff*, 14 S. & R. 181; *Johnson's Appeal*, 9 Pa. 416; *Adams v. Adams*, 51 N. H. 388, 12 Am. R. 134; *Bomsta v. Johnson*, 38 Minn. 230.

<sup>6</sup> *Lord v. Lord*, 66 Me. 265; *Hopkins v. Hopkins*, 39 Wis. 167; *Gechter v. Gechter*, 51 Md. 187; *Adams v. Adams*, 51 N. H. 388, 400, 12 Am. R. 134; *Caldwell v. Fifield*, 4 Zab. 150.

<sup>7</sup> *Steel v. Steel*, 104 N. C. 631.

<sup>8</sup> *Ex parte Smith*, 34 Ala. 455, 460.

§ 1563. In a **Collateral Proceeding**,—wherein the divorce sentence becomes important, a party to it cannot set up either his own fraud<sup>1</sup> or that of the other party, and ask to have it held void therefor. Yet he could do this if the court rendering it were without jurisdiction.<sup>2</sup> Where there was a jurisdiction, it would be monstrous to permit even the party on whom the fraud was practised to decline aid to the court in purifying its records,—refuse to let the question of his status be settled once for all by applying to have the fraudulent sentence cancelled,—and still set up collaterally its nullity to-day, with the liberty not to raise the question to-morrow; being married one day, and unmarried another. He should either condone the fraud or proceed directly to have the sentence vacated.<sup>3</sup> The case is different where one of the parties is dead, or a third person has occasion to rely on the fraud.<sup>4</sup> And—

<sup>1</sup> Ante, § 1548.

<sup>2</sup> Ante, § 1545, 1546.

<sup>3</sup> *Baily v. Baily*, 44 Pa. 274; *Ruger v. Heckel*, 21 Hun, 489; *Prudham v. Phillips*, cited Amb. 763, 2 Burn Ec. Law, 495. In this last case, according to Mr. Ford's note as published by Hargrave, the court after laying down the doctrine that fraud may be set up in answer to an ecclesiastical sentence of nullity, which has been offered in evidence, proceeded: "But who ever knew a *defendant* plead that a judgment obtained against him was fraudulent? He must apply to the court; and if both parties colluded in the cheat upon the court, it was never known that either of them could vacate the judgment. Here defendant was party to the sentence; and whether she was imposed upon or she joined in deceiving the court, this is not the time or place for her to redress herself. She may, if she has occasion, appeal, or apply otherwise to the proper judge." Harg. Law Tracts, 456, note; Hubback on Succession, 269. See *Pease v. Naylor*, 5 T. R. 80; *Meddowcroft v. Huguenin*, 3 Curt. Ec. 403, 7 Eng. Ec. 438; s. c. on Appeal, 4 Moore P. C. 386; *Greene v. Greene*, 2 Gray, 361, 4 Am. Law Reg. 1, 42, 61 Am. D. 454; *Adams v. Adams*, 51 N. H. 388, 12 Am. R. 134. **Other Judgments.**—The rule for other judgments than divorce is believed to be the same, though the foundation of reason is less

firm for them. Thus, by the settled doctrine, though there may have been contrary opinions, fraud cannot be pleaded to an action upon either a domestic judgment or that of another State. *Christmas v. Russell*, 5 Wal. 290, 304; *Maxwell v. Stewart*, 22 Wal. 77, 81; *Allison v. Chapman*, 19 Fed. Rep. 488. And consult, on the one side or the other of this sort of question in cases not matrimonial, *Tarbox v. Hays*, 6 Watts, 398, 31 Am. D. 478; *Whetstone v. Whetstone*, 31 Iowa, 276; *Cowin v. Toole*, 31 Iowa, 513; *Ransley v. Stott*, 26 Pa. 126; *Webster v. Reid*, Morris, 467; *Mandeville v. Reynolds*, 68 N. Y. 528; *Dunlap v. Cody*, 31 Iowa, 260, 7 Am. R. 129; *C. v. Trout*, 76 Pa. 379; *P. v. Downing*, 4 Sandf. 189; *Barron v. Tart*, 18 Ala. 668; *Fisk v. Miller*, 20 Tex. 579; *Peck v. Woodbridge*, 3 Day, 30; *Wilson v. Barney*, 5 Hun, 257; *Kelley v. Mize*, 3 Sneed, 59; *Franklin v. Stagg*, 22 Mo. 193; *Field v. Flanders*, 40 Ill. 470; *S. v. Little*, 1 N. H. 257; *Callahan v. Griswold*, 9 Misso. 784; *Postens v. Postens*, 3 Watts & S. 127; *Baird v. Campbell*, 4 Watts & S. 191; *Hall v. Hamlin*, 2 Watts, 354; *Tappan v. Nutting*, Brayt. 137.

<sup>4</sup> *Newcomb v. Newcomb*, 13 Bush, 544, 26 Am. R. 222; *Wright v. Wright*, 4 Halst. Ch. 143, 153. And see *Shedden v. Patrick*, 1 Macq. Ap. Cas. 535, 607, 626; *Jordan v. Van Epps*, 58 How. Pr. 338.

§ 1564. **In Ex Parte Divorce** — the question is not necessarily just the same, whatever be the true doctrine. Thus, in a case the facts whereof are not very distinct in the report, the majority of a divided bench held that one against whom such a divorce has been rendered may avoid its effect in a collateral proceeding, by showing it to have been obtained by fraud, and, perhaps should be added, without notice actual or constructive to him. Handy, J., dissenting, said: "If the complainant would avoid the decree of divorce for fraud, it was necessary to proceed directly to that end, and to pray for that relief."<sup>1</sup> The author's understanding of the law concurs with that of Handy, J.; yet, on the other hand, if there was neither actual nor constructive notice, and the omission was patent of record, the decree would be void in distinction from voidable, as showing on its face no jurisdiction, therefore of no effect between any parties.<sup>2</sup>

### III. *As to Third Persons.*

§ 1565. **Rights of—Distinguished from Parties.** — We have thus seen that the innocent and injured party may have a fraudulent divorce sentence against him vacated on a direct application therefor.<sup>3</sup> But whatever right to do the same an injured third person has on the general principles of our jurisprudence,<sup>4</sup> our technical rules of practice forbid its exercise in this form; yet the substance of the right remains. Though in name marriage and divorce are severally transactions between one man and one woman, in effect each binds the world to the same extent as the parties. So that any fraud which makes a divorce null as between the parties renders it equally so as to third persons. But since under our technical rules the third person, whatever his interest, is not a party to the divorce suit, he cannot apply to have a fraudulent decree vacated. Yet since also he has the right not to have it used against him, for which right the law must afford him some remedy,<sup>5</sup> he has the only possible remedy; namely, to set up collaterally the fraud whenever the question arises. To illustrate, —

<sup>1</sup> *Plummer v. Plummer*, 37 Missis. 185, 201.

<sup>2</sup> *Ante*, § 1544, 1545; *Anderson v. Miller*, 4 Blackf. 417.

<sup>3</sup> *Ante*, § 1549 et seq.

<sup>4</sup> *Ante*, § 1542, 1543.

<sup>5</sup> 1 Bishop Crim. Proced. § 113-116.

§ 1566. **Children** — are not commonly with us admitted as parties or permitted to intervene in the divorce suits of their parents. Therefore in Michigan they cannot maintain the proceeding to have the divorce sentence annulled for fraud in its procurement.<sup>1</sup> But in a State where they could be parties, the consequence would in reason be otherwise.<sup>2</sup> Therefore the rule is that —

§ 1567. **Void collaterally as to Third Persons.** — Where persons against whom a fraudulent sentence of divorce is set up “could,” in the words of Redfield, J., spoken in a case not matrimonial, “have brought no process or suit whatever to reverse or set it aside, they must be permitted to avoid the effect of the judgment in this manner” — that is, by attacking it collaterally for the fraud — “if at all.”<sup>3</sup> And the doctrine is settled that in some way, hence necessarily in this way, any third person against whom a fraudulent divorce sentence is produced may avoid it by showing the fraud; since fraud in these causes, as in all others, vitiates every judgment into which it enters.<sup>4</sup>

§ 1568. **In Sentence of Sister State.** — We have seen that to make a divorce sentence in one State conclusive in every other, within the provisions of the United States Constitution and statute, the court must have jurisdiction both under the domestic law and within the principles of interstate law.<sup>5</sup> Then the sentence has, in every State of the Union, “such faith and credit given” it as it has “by law or usage in the courts of the State” *where it was rendered*.<sup>6</sup> If therefore it is, though fraudulent, conclusive collaterally between the parties in the State pronouncing it, and the only method by which the defrauded party can avoid it is to proceed in the court wherein it was rendered, to have it set aside,<sup>7</sup> the same rule applies where the sentence

<sup>1</sup> Baugh v. Baugh, 37 Mich. 59.

<sup>2</sup> And see Prudham v. Phillips, cited ante, § 1548, 1563.

<sup>3</sup> Atkinson v. Allen, 12 Vt. 619, 624, 36 Am. D. 361.

<sup>4</sup> Story Conf. Laws, § 597; Harg. Law Tracts, 479, 485; Brownsword v. Edwards, 2 Ves. Sen. 243, 246; Webster v. Reid, 11 How. U. S. 437; Hake v. Fink, 9 Watts, 336; Conway v. Beazley, 3 Hag. Ec. 639, 5 Eng. Ec. 242, 244, 245; Roach v. Garvan, 1 Ves. Sen. 157; 3 Burge Col. & For. Laws, 1060, 1061; Harding v. Alden, 9

Greenl. 140, 151, 23 Am. D. 549; Jackson v. Jackson, 1 Johns. 424; 2 Kent Com. 109; Harrison v. Southampton, 17 Eng. L. & Eq. 364, 21 Eng. L. & Eq. 343; Smith v. Gettinger, 3 Kelly, 140; Vanderveere v. Gaston, 4 Zab. 818; Roemer v. Denig, 18 Pa. 482; Lewis v. Rogers, 16 Pa. 18; Carroll v. Cockerham, 38 La. An. 813.

<sup>5</sup> Ante, § 5, 31.

<sup>6</sup> Ante, § 181.

<sup>7</sup> As explained in the last sub-title.



is set up by the defrauding against the defrauded party in any other State. The only redress for the latter is in the State and court wherein it was given. The terms of our supreme written law are too plain to admit of further discussion.<sup>1</sup> Not all the decisions, however, are in harmony with this doctrine. They do not require individual examination.<sup>2</sup>

#### IV. *The Nature of the Fraud.*

§ 1569. **Whether differs with Person relying thereon.** — From the foregoing expositions,<sup>3</sup> it distinctly follows that the adequate fraud is the same whether set up by the defrauded party on a direct application for an order vacating the sentence, or by an interested third person collaterally in some other proceeding. But to this there is the one exception, rather seeming than real, that as neither party to a mutual fraud on the court can ask redress for it,<sup>4</sup> a collusive sentence will not be vacated on prayer of the party, but it will be held void collaterally when brought forward or otherwise appearing against a third person in interest. Therefore the better expression of the doctrine is that the fraud is the same in either case, yet that the rules of our judicial procedure forbid the party to procure the annulling of a collusive decree, since the court will not listen to the plea of his own fraud. Now, —

§ 1570. **Uncertain Limits.** — It is plain that collusion, whereby the court is deceived into rendering a wrongful divorce,<sup>5</sup> is an adequate fraud within our present inquiries. But fraud is multitudinous. Its forms have never been numbered, and it is impossible they should be. So we can here inquire only after

<sup>1</sup> And see the fuller explanations, ante, § 180–185.

<sup>2</sup> *Baker's Will*, 2 Redf. 179; *Hill v. Hill*, 28 Barb. 23; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. R. 129; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. R. 132; *Doughty v. Doughty*, 12 C. E. Green, 315, 1 Stew. Ch. 581; *Barber v. Barber*, 21 How. U. S. 582; *Rebstock v. Rebstock*, 2 Pittsb. 124; *Werner v. Werner*, 30 Ill. Ap. 159; *Waldo v. Waldo*, 52 Mich. 94. The doctrine of the text would seem to be that of the Supreme Court of the United States. See (not divorce cases) *Christmas v. Russell*, 5 Wal.

290, 304; *Maxwell v. Stewart*, 22 Wal. 77. See, for other illustrative cases, not of divorce, *Walton v. Sugg*, Phillips, N. C. 98, 93 Am. D. 580; *Davis v. Smith*, 5 Ga. 274, 48 Am. D. 279; *Whitaker v. Bramson*, 2 Paine, 209; *Warren Manuf. Co. v. Ætna Ins. Co.* 2 Paine, 501; *Anderson v. Anderson*, 8 Ohio, 108; *Coffee v. Neely*, 2 Heisk. 304; *Waddams v. Burnham*, 1 Tyler, 233, 237.

<sup>3</sup> Particularly ante, § 1565.

<sup>4</sup> Ante, § 1548, 1563.

<sup>5</sup> Ante, § 249.

a few particulars, illustrative of the wider doctrine to which we are powerless to set bounds. Thus, —

§ 1571. **Insufficient or Perjured Evidence — Mistake of Law.** — Early in our judicial records we have the observation that “if they of the Spiritual Court give judgment in any cause, be it true or false, until it be reversed or defeated it shall bind all the world; as, in our law, a recovery upon a false oath binds until it be defeated by attain.”<sup>1</sup> Whence the doctrine has become established that insufficient or false evidence, or error of law by the court, does not render the judgment procured thereby fraudulent.<sup>2</sup>

§ 1572. **Fraud of Stranger — One Party — Both.** — It may be doubted whether the fraud of any mere stranger to the suit,<sup>3</sup> not known or concurred in by either party, could make fraudulent the sentence, while yet we have become abundantly informed that the fraud of one only of the parties may suffice. Lord Brougham once uttered a *dictum*, containing a grain of truth if not more, and worth examining, as follows: “The fraudulent suppression of evidence by one party would be insufficient. It is when the two parties combine together that it becomes collusion. In the words of Wedderburn, in the Duchess of Kingston’s Case:<sup>4</sup> ‘A sentence obtained by fraud and collusion is no sentence. In order to make a sentence, there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these requisites not one takes place in the case of a fraudulent and collusive suit. There is no judge; but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious cause proposed to him. There is no party litigating, there is no party defendant, no real interest brought into question; and, to use the words of a very sensible civilian on this point, *fabula non iudicium, hoc est; in scena, non in foro, res agitur.*’”<sup>5</sup> Still, —

§ 1573. **The Suppression of a Fact** — by one only of the parties, while plainly not as of course vitiating the sentence, may be of a sort to render it fraudulent. Thus, after a Scotch divorce and

<sup>1</sup> Anonymous, 1 Dy. 13, pl. 61. And see *Waldo v. Waldo*, 52 Mich. 94, 99, 100.

<sup>2</sup> *Preston v. Clark*, 9 Ga. 244; *Baker v. Palmer*, 83 Ill. 568; *Riley v. Murray*, 8 Ind. 354; *Hatch v. Garza*, 22 Tex. 176.

<sup>3</sup> Vol. I. § 468.

<sup>4</sup> *Duchess of Kingston’s Case*, 20 How. St. Tr. 478, 479.

<sup>5</sup> *Meddowcroft v. Huguenin*, 4 Moore P. C. 386; *Perry v. Meddowcroft*, 10 Beav. 122.

second marriage, the second wife brought in England her nullity suit on the ground that the divorce was void. And Dr. Lushington, speaking to the admissibility of her libel, observed: "It has been said . . . that the divorce at Edinburgh was only pleaded because it was deemed improper to keep the court in ignorance of that circumstance. If a fact of such magnitude had been suppressed, I am of opinion that any sentence pronounced by the court would have very little availed the parties, — that it would not have been finally binding, but would have been open to re-examination, — that such suppression would, in short, have rendered the proceedings liable to impeachment."<sup>1</sup> We have another —

§ 1574. **Illustrative Instance.** — While parties were living in Connecticut, the wife obtained from the legislature a divorce from bed and board for the husband's cruelty. Five years later, he applied to a court in Vermont, where he was residing, for a divorce *a vinculo* on the allegation that she had deserted him, suppressing the fact of the Connecticut proceeding. Constructive service was made on her by publication, but she had no actual notice of his suit and did not appear. Judgment was rendered dissolving the marriage; but, the case coming before a New York court, it held that as he had imposed upon the Vermont tribunal by allegations which he knew to be false, and had concealed the real facts, the judgment was void.<sup>2</sup>

§ 1575. **Insufficient in Degree — (Paying Costs — Proofs).** — The fraud must have been of due magnitude.<sup>3</sup> For example, a sentence will not be avoided simply because the prevailing party agreed to pay the other's costs, some witnesses were not examined and others not cross-examined, and obstacles were not interposed which might have been.<sup>4</sup> "The proof of fraud of a grave character ought to be clear; and the court would be slow to reverse a decree of divorce, when the libellant appeared, or had due and actual notice to appear, unless fraud of a serious character is established."<sup>5</sup>

§ 1576. **Fraud as to Domicil.** — When parties resort for divorce

<sup>1</sup> Conway v. Beazley, 3 Hag. Ec. 639,  
<sup>5</sup> Eng. Ec. 242, 244, 245.

<sup>2</sup> Borden v. Fitch, 15 Johns. 121, 145,  
8 Am. D. 225. And see Allen v. Mac-  
clellan, 12 Pa. 328, 51 Am. D. 608; Har-  
rison v. Harrison, 19 Ala. 499; Vischer v.  
Vischer, 12 Barb. 640.

<sup>3</sup> Bishop Non-Con. Law, § 35, 36.

<sup>4</sup> Perry v. Meddowcroft, 10 Beav. 122;  
Meddowcroft v. Huguenin, 3 Curt. Ec. 403,  
7 Eng. Ec. 438; s. c. on appeal, 4 Moore  
P. C. 386.

<sup>5</sup> Adams v. Adams, 51 N. H. 388, 400,  
12 Am. R. 134, opinion by Bellows, C. J.

to a foreign State or country, without a change of domicil, it, we have seen,<sup>1</sup> will be treated elsewhere as null. The true principle is that within the rules of international and interstate law, the divorcing court was without jurisdiction. Yet this sort of case is sometimes treated as pertaining to fraud,—the proceeding being deemed a fraud on the law of the domicil.<sup>2</sup> That the divorce is invalid, and that it is not the less so though the divorcing court finds as of record the requisite jurisdictional facts,<sup>3</sup> are propositions abundantly settled alike in authority and in reason.<sup>4</sup>

§ 1577. *The Doctrine of this Chapter restated.*

A divorce sentence pronounced without jurisdiction in the tribunal is a mere nullity. Where there is a jurisdiction, it is not void, but if there have been false steps they are liable to be reversed as pointed out in preceding elucidations. On the other hand, a false step produced by fraud has peculiarities of its own, as explained in this chapter. It is not bound by the ordinary rules for correcting judgments, for new trials, and other like things. Over and above and aside from those rules, the fraud is a separate ground for annulling or for holding as void the fraudulent proceeding or sentence. If a party to the suit would take advantage of the fraud, he may and must do it on a direct application to the court for the reversal of its decree, but an interested person who is not a party has no standing in the cause, so he will not be heard on such an application. Therefore he, unlike the party, is permitted to set up the fraud collaterally in any other suit wherein the question arises, and if he proves the fraud, the fraudulent judgment will not be permitted an effect to his harm. A verdict rendered on insufficient or perjured evidence, or on an erroneous direction from the court, is not fraudulent within the present doctrine. The adequate fraud is not quite definable, but it is some grave and serious scheming whereby the court is misled to the perversion of justice.

<sup>1</sup> Ante, § 41-75.

<sup>3</sup> Ante, § 182-184.

<sup>2</sup> Jackson v. Jackson, 1 Johns. 424; 2 Kent Com. 108. And see Vischer v. Vischer, 12 Barb. 640; Lyon v. Lyon, 2 Gray, 367.

<sup>4</sup> See, for example, Kerr v. Kerr, 41 N. Y. 272; Hoffman v. Hoffman, 46 N. Y. 30, 7 Am. R. 299; Leith v. Leith, 39 N. H. 20.

## CHAPTER XLVIII.

THE FORCE AND STABILITY OF THE SENTENCE IN THE ABSENCE  
OF FRAUD.

§ 1578. **Already**, — to make plain the elucidations of preceding chapters, it has become necessary to state in anticipation the principal doctrines of this one. Hence something of repetition is unavoidable.

§ 1579. **A Jurisdiction**, — we have in more than one place had occasion to see, is essential to the validity of every judgment or judicial record.<sup>1</sup> But —

§ 1580. **Sentence Conclusive**. — Assuming the jurisdiction and the absence of fraud, the divorce or nullity decree is binding on the court rendering it, in all proceedings other than to open it or set it aside; and upon all other tribunals it is binding in all proceedings, direct and collateral, whether between the same parties and their privies, or between them and strangers, or between strangers, — not only in the country where it was rendered, but in all foreign countries. A sentence, to have this effect, must be a direct adjudication upon the specific question of the marriage or its dissolution; and a finding which might be inferred argumentatively is not attended by this consequence.<sup>2</sup> Moreover, —

<sup>1</sup> Ante, § 4, 182-184, 1545; *Cheely v. Clayton*, 110 U. S. 701; *Morey v. Morey*, 27 Minn. 265.

<sup>2</sup> Ante, § 1532; *Roach v. Garvan*, 1 Ves. Sen. 157, 159; *Hillyard v. Grantham*, cited 2 Ves. Sen. 246; *Meadows v. Kingston*, Amb. 756; *Prudham v. Phillips*, cited Ib. 763, Harg. Law Tracts, 456; 2 Burn Ec. Law, 495; *Rex v. Roche*, 1 Leach, 4th ed. 134; *Meddowcroft v. Huguenin*, 3 Curt. Ec. 403, 7 Eng. Ec. 438; s. c. on appeal before the Privy Council, 4 Knapp, 386; *Bunting v. Lepingwell*, 4 Co. 29 a; s. c. nom. *Banting's Case*, Sir F. Moore, 169; *Blackham's Case*, 1 Salk. 290; *Guest*

*v. Shipley*, 2 Hag. Con. 321, 4 Eng. Ec. 548, 549; *Clews v. Bathurst*, 2 Stra. 960; *Dacosta v. Villa Real*, 2 Stra. 961; *Kenn's Case*, 7 Co. 42 b; *Jones v. Bow*, Carth. 225; *Hatfield v. Hatfield*, stated 20 How. St. Tr. 395; *Morris v. Webber*, 2 Leon. 169; s. c. *Morris v. Webber*, Sir F. Moore, 225; *Dickson v. Dickson*, 1 Yerg. 110, 114, 24 Am. D. 444; *Dorsey v. Dorsey*, 7 Watts, 349; *Legg v. Legg*, 8 Mass. 99; *Clarke v. Lott*, 11 Ill. 105; *Hake v. Fink*, 9 Watts, 336; 1 *Browne Civil Law*, 96; *Story Conf. Laws*, § 594-597, 1 *Greenl. Ev.* § 544, 545; 2 *Ib.* § 461; *Jenk. Cent.* 44; *Harg. Law Tracts*, 449; *Mansfield v.*

§ 1581. **Cause of Foreign Divorce Immaterial.** — Where the divorce is foreign, it is immaterial whether or not it is for a cause allowed by the domestic law.<sup>1</sup> So, —

§ 1582. **Indian Divorce without Sentence.** — If parties are domiciled in an Indian country where the husband abandons his wife, and by the Indian law the abandonment works alone without further proceedings a dissolution of the marriage, it will be treated in the courts of a Christian State as a divorce.<sup>2</sup>

§ 1583. **Effect of In Rem.** — In contemplating the foregoing propositions, or interpreting them, or inquiring into their accuracy, we must take into the account the conclusion from earlier elucidations that the divorce proceeding is, as to the status of marriage, *in rem*.<sup>3</sup> The marriage of parties, creating in them a new status and establishing a new family, recognized not only in the country of their domicile but throughout the world, revolutionizes some right of every other human being within the sphere of its operation. Every man is forbidden afterward to marry the woman, every woman to marry the man. And every person in any way expectant of property from one of the parties, or relying on the testimony of one of them in a judicial controversy, is liable to have his expectations cut off by the changes which marriage brings. Hence, on the other hand, a divorce must be and is equally full in its effects. Hence, also, —

§ 1584. **The Nullity Suit,** — equally with the ordinary one for dissolution, is within our present rules.<sup>4</sup> It has with some show of authority been contended that the conclusiveness of the nullity sentence applies only to the parties and their privies, including persons who might have intervened, whether they did so or not; while yet it is admitted that such other persons than the parties

McIntyre, 10 Ohio, 27; Cooper v. Cooper, 7 Ohio, 238; Ryan v. Ryan, 2 Phillim. 332, 1 Eng. Ec. 274; Conway v. Beazley, 3 Hag. Ec. 639, 5 Eng. Ec. 242; Harding v. Alden, 9 Greenl. 140, 23 Am. D. 549; Patterson v. Gaines, 6 How. U. S. 550, 559; Barber v. Root, 10 Mass. 260; Marvin v. Collins, 48 Ill. 156. See, query, Scrimshire v. Scrimshire, 2 Hag. Ec. 395, 4 Eng. Ec. 562, 569; Hansford v. Hansford, 34 Mo. Ap. 262. And see Sinclair v. Sinclair, 1 Hag. Con. 294, 4 Eng. Ec. 412, 414; Goodin v. Smith, Milward, 236, 245.

<sup>1</sup> Ante, § 43, 48, 53, 74, 174-178; Barber v. Root, 10 Mass. 260; Wall v. Williamson, 8 Ala. 48; Hull v. Hull, 2 Strob. Eq. 174, 177, 178.

<sup>2</sup> Wall v. Williamson, 8 Ala. 48; Wall v. Williams, 11 Ala. 826.

<sup>3</sup> Ante, § 19-23, 26, 27, 36, 37, and many other places; Yelverton v. Yelverton, Law Rep. 1 H. L. Sc. 218, 224; Lord v. Chadbourne, 42 Me. 429, 66 Am. D. 290; Mordaunt v. Mordaunt, Law Rep. 2 P & M. 109, 121, 143; 2 Taylor Ev. § 1488.

<sup>4</sup> And see ante, § 39, 73, 797.

need not have had notice of the proceedings to be bound by them. But it is held that a child *en ventre sa mère* at the time of pronouncing the sentence of nullity is estopped by it;<sup>1</sup> and on the whole the sentence appears both on principle and authority to be, when free from fraud, conclusive upon all persons.<sup>2</sup>

§ 1585. **The Jactitation Suit**, — never adopted into the practice of any of our States, becomes what is frequently yet inexactly called a nullity one when the respondent justifies his boasting by averring a marriage.<sup>3</sup> But in the form of the sentence, if not otherwise, it differs from the proper nullity suit as inherited by us from the mother country. In the latter, the sentence against the marriage is, that there was a pretended marriage between the parties, but for causes specified it was and is null and void, and the plaintiff was and is free from all bond of marriage with the defendant.<sup>4</sup> In the jactitation suit, the corresponding sentence is, not that there was a pretended marriage which was null, but that none was entered into *as far as yet appears*.<sup>5</sup> Now, is this jactitation sentence, when free from fraud, conclusive on the world like the other? We have authority that it is.<sup>6</sup> But a famous and much-cited case, yet to be taken subject to the consideration that in the facts thereof fraud appeared, leaves this question in doubt.<sup>7</sup> The jactitation suit having nearly faded out from the English law, and never having existed in our own, nothing further concerning it need be given here.

### § 1586. *The Doctrine of this Chapter restated.*

The divorce sentence, like any other legal judgment, can be reversed or vacated only in the way pointed out by those rules of procedure which control the courts. Fraud furnishes a sort of exception to this proposition, but that is explained in the last

<sup>1</sup> *Perry v. Meddowcroft*, 10 Beav. 122. But not if procured by fraud. *Harrison v. Southampton*, 17 Eng. L. & Eq. 364, 21 Eng. L. & Eq. 343.

<sup>2</sup> For the cases see ante, § 1580.

<sup>3</sup> Ante, § 796; *Hawke v. Corri*, 2 Hag. Con. 280, 285, 288; *Bodkin v. Case*, Milward, 355; *Coote Ec. Pract.* 357-360; 1 *Browne Civil Law*, 96, note.

<sup>4</sup> *Coote Ec. Pract.* 402, 403.

<sup>5</sup> See the sentence which was relied upon in the *Duchess of Kingston's Case*,

20 How. St. Tr. 355, 390; *Bodkin v. Case*, Milward, 355, 361.

<sup>6</sup> *Clews v. Bathurst*, 2 Stra. 960; *Dacosta v. Villa Real*, 2 Stra. 961.

<sup>7</sup> *Duchess of Kingston's Case*, 20 How. St. Tr. 355, 2 Smith Lead. Cas. 424, more briefly reported, 1 Leach, 4th ed. 146, 1 East P. C. 468. As to which, see also *Harg. Law Tracts*, p. 449. And see *Barrs v. Jackson*, 1 Y. & Col. C. C. 585, 590, 593; 1 *Browne Civil Law*, 96, note.

chapter. So that in the absence of fraud the sentence of divorce, when the time is passed for a new trial, writ of error, or the like, is irrevocable. And as a marriage is an international affair, and binds the world, so is a judgment of dissolution or of nullity. It fixes the status of the parties, and it is irrevocable. Of course, and not in conflict with these propositions, if the court is without jurisdiction, the legal consequence is the same as though there were no court, and what in words appears as a sentence is to be regarded no otherwise than as a blank leaf of paper or parchment.



## CHAPTER XLIX.

## EFFECTS ON FUTURE PROCEEDINGS.

§ 1587. **Once Litigated.** — The rule that what has been litigated to final judgment cannot be retried between the same parties<sup>1</sup> governs divorce and nullity suits, equally as other civil causes. Thus, —

§ 1588. **The Marriage** — and its legality are fundamental questions in every suit for divorce, and the divorce sentence in form and effect affirms them.<sup>2</sup> The consequence of which appears clearly to be that after such a sentence these questions can no more be stirred. So that, for example, one separated from bed and board for his adultery cannot be heard on an application to have the marriage declared null for impotence.<sup>3</sup> So, —

<sup>1</sup> *Lothrop v. Southworth*, 5 Mich. 436; *Bennett v. Holmes*, 1 Dev. & Bat. 486; *Cleveland, &c. Rld. v. Erie*, 27 Pa. 380; *Rhoades v. Selin*, 4 Wash. C. C. 715; *Parkhurst v. Sumner*, 23 Vt. 538, 56 Am. D. 94; *Davis v. Milburn*, 4 Iowa, 246; *Weathered v. Mays*, 4 Tex. 387; *Society for Propagation of the Gospel v. Hartland*, 2 Paine, 536; *Foster v. Wells*, 4 Tex. 101; *Wingo v. Watson*, 98 N. C. 482; *Peak v. Ligon*, 10 Yerg. 469; *Loring v. Arnold*, 15 R. I. 428.

<sup>2</sup> Ante, § 733.

<sup>3</sup> *Guest v. Shipley*, 2 Hag. Con. 321, 4 Eng. Ec. 548. So the doctrine is in principle, and so Lord Stowell laid it down in this case of *Guest v. Shipley*. But it seems not to have been always in the minds of the judges, though I am not aware of the contrary having ever been distinctly held. Thus, in a husband's nullity suit, Sir J. Dodson said: "This case is attended with very peculiar circumstances. The marriage took place in 1826. Then a suit was promoted by the wife against the husband for a separation by reason of

adultery, in which she obtained a sentence; the marriage, therefore, which is the foundation of a decree of separation, must in that suit have been established. Then in 1838 there was a suit for nullity of marriage (1 Curt. Ec. 870) promoted by the wife against the husband. The husband defended that suit, and successfully, for the marriage was not held to be void and null. The wife then had obtained a sentence of separation, but failed in her suit for annulling the marriage; and so things remained till the present suit was instituted by the husband. When the present case came before Sir H. Jenner Fust, he took the objection that the jurisdiction was not sufficiently pleaded; for the libel did not plead that the domicile of the wife was in the diocese of Canterbury," &c. So the case was disposed of without any intimation that the former proceedings would be a bar. *Williams v. Dormer*, 16 Jur. 366, 9 Eng. L. & Eq. 598, 2 Rob. Ec. 505. Some of the facts in *Gaines v. Relf* seem to have furnished scope for an examination of the

§ 1589. **Cruelty — Adultery — Criminal Conversation.** — The estoppel of a judgment extends to whatever the parties might have litigated, whether they chose to bring it forward or not.<sup>1</sup> A wife's adultery is a bar to her suit for the husband's cruelty.<sup>2</sup> If, therefore, a wife brings a divorce suit for cruelty, and the husband, knowing her to have committed adultery, does not set it up in bar, whereupon a sentence of divorce is rendered against him, he cannot afterward maintain against the adulterer an action for the criminal conversation. She, with the adulterer, is conclusively presumed to be innocent.<sup>3</sup> And —

§ 1590. **A Judgment in another State** — has for this sort of purpose the same effect as in our own,<sup>4</sup> though it is otherwise of a mere suit pending.<sup>5</sup> Thus, in Maine, it was laid down that a Massachusetts divorce decree from bed and board for the husband's cruelty is, on a libel in Maine for divorce from the bond of matrimony, conclusive between the parties as to their conduct toward each other to the date of the decree.<sup>6</sup> But —

§ 1591. **The Mere Pendency** — of a divorce proceeding does not have the effect we are considering.<sup>7</sup> Even —

§ 1592. **A Dismissal "without Prejudice,"** — which, though the testimony is in and the case is under advisement it is competent for the court in its discretion to make,<sup>8</sup> being in the nature of a nonsuit, does not bar a future proceeding for the same cause.<sup>9</sup> Practically, this form of dismissal ought to be made only for some justifying reason,<sup>10</sup> since a litigation should have its time to close.<sup>11</sup> Yet —

§ 1593. **"Libel Dismissed,"** — without qualifying words, or some other similar expression, is the common form of a determination

doctrine, but nothing of it appears in the report, 12 How. U. S. 472. And see, as illustrative, *Jones v. Jones*, 36 Md. 447, 11 Am. R. 505, 36 Md. 459; *Miller v. Miller*, 150 Mass. 111; *Muirhead v. Muirhead*, 23 Missis. 97.

<sup>1</sup> *Lindsley v. Thompson*, 1 Tenn. Ch. 272.

<sup>2</sup> Ante, § 352, 355, 377, 395.

<sup>3</sup> *Gleason v. Knapp*, 56 Mich. 291, 56 Am. R. 388.

<sup>4</sup> *Whiting v. Burger*, 78 Me. 287.

<sup>5</sup> Ante, § 188.

<sup>6</sup> *Slade v. Slade*, 58 Me. 157. See *Bradshaw v. Heath*, 13 Wend. 407; *Blain v. Blain*, 45 Vt. 538.

<sup>7</sup> *Thornton v. Thornton*, 11 P. D. 176; *Knapp v. Knapp*, 6 P. D. 10.

<sup>8</sup> *Ashmead v. Ashmead*, 23 Kan. 262.

<sup>9</sup> *English v. English*, 12 C. E. Green, 579, 586; *Cochran v. Couper*, 2 Del. Ch. 27; *Wanzer v. Self*, 30 Ohio St. 378; *Lang v. Waring*, 25 Ala. 625, 60 Am. D. 533; *Fisk v. Parker*, 14 La. An. 491; *Crews v. Cleghorn*, 13 Ind. 438; *Burton v. Burton*, 58 Vt. 414. See *Brown v. Brown*, 37 N. H. 536, 75 Am. D. 154; *Burlen v. Shannon*, 3 Gray, 387.

<sup>10</sup> *Cornelius v. Cornelius*, 31 Ala. 479, 483.

<sup>11</sup> *Rumbly v. Stainton*, 24 Ala. 712, 719.

by the court for the defendant. After which, the plaintiff is precluded from maintaining another suit for the same cause. But he may proceed for subsequent offences, or for offences which occurred during the pendency of the first suit,<sup>1</sup> or for a separate and distinct dereliction.<sup>2</sup>

§ 1594. **Ordinary Rules.** — In respect to the foregoing questions and all analogous ones, the courts follow the ordinary rules in civil causes; so that with a reference to cases which the practitioner may find it convenient to consult,<sup>3</sup> this chapter will here close.

§ 1595. *The Doctrine of this Chapter restated.*

It is fundamental in judicial practice that parties can litigate to judgment the same thing but once. The consequence whereof is that after a divorce suit has terminated in favor either of the plaintiff or the defendant, no second suit can be brought to try anew anything within the scope of this one, whether in fact it was considered therein or not. A dismissal of the suit is a decree for the defendant, the same as the awarding of a divorce is a decree for the plaintiff. But it is competent for the court to dismiss the case "without prejudice," and then the question may be retried on a fresh complaint.

<sup>1</sup> Vance v. Vance, 17 Me. 203; Griffin v. Griffin, 8 B. Monr. 120; Finney v. Finney, Law Rep. 1 P. & M. 483; Lewis v. Lewis, 106 Mass. 309; Bevan v. Bevan, 4 Swab. & T. 265; Moore v. Moore, 22 Tex. 237; Lockyer v. Ferryman, 2 Ap. Cas. 519; Robinson v. Robinson, 2 P. D. 75.

<sup>2</sup> Lyster v. Lyster, 111 Mass. 327; Vinsant v. Vinsant, 49 Iowa, 639. See, and query, Bartlett v. Bartlett, 113 Mass. 312, 18 Am. R. 493.

<sup>3</sup> Burlen v. Shannon, 3 Gray, 387; Burlen v. Shannon, 99 Mass. 200, 96 Am. D. 733; Kalisch v. Kalisch, 9 Wis. 529; Lea v. Lea, 99 Mass. 493, 96 Am. D. 772; Bland v. Bland, Law Rep. 1 P. & M. 237; Sopwith v. Sopwith, 2 Swab. & T. 160;

Evans v. Evans, 1 Swab. & T. 173; Brown v. Brown, 37 N. H. 536; Gill v. Read, 5 R. I. 343, 73 Am. D. 73; Fera v. Fera, 98 Mass. 155; Lewis v. Lewis, 106 Mass. 309; Thurston v. Thurston, 99 Mass. 39; Amory v. Amory, 26 Wis. 152; Burlen v. Shannon, 14 Gray, 433; De Graw v. De Graw, 7 Mo. Ap. 121; Needham v. Bremner, Law Rep. 1 C. P. 583; Conradi v. Conradi, Law Rep. 1 P. & M. 391; Rand v. Rand, 58 N. H. 536; Umlauf v. Umlauf, 117 Ill. 580, 57 Am. R. 880; Hubert v. Fera, 99 Mass. 198, 96 Am. D. 732; Ford v. Ford, 143 Mass. 577; Wagner v. Wagner, 36 Minn. 239; Holbrook v. Holbrook, 32 La. An. 13.

## BOOK XIV.

## THE RESULTINGS FROM THE DIVORCE.

## CHAPTER L.

## THE DECREE OF NULLITY.

§ 1596. **Between the Parties.** — Whether the marriage which the nullity decree pronounces void was truly such or only voidable,<sup>1</sup> after the decree and between the parties it is conclusively regarded as never having existed. Or, to copy from one of our books, “If the wife becomes a single woman by operation of law, it is the same as if she had always remained single.”<sup>2</sup> To illustrate, —

§ 1597. **Property Rights** — (**Curtesy, Dower, Alimony, &c.**). — After this decree, the parties’ rights of property between themselves are viewed as never having been affected by the marriage. The man can claim neither the personal estate which was the woman’s, nor curtesy in her lands.<sup>3</sup> She is not entitled to share in his effects, nor can she have alimony or dower.<sup>4</sup> And —

§ 1598. **Sue and be sued** — (**Property — Services**). — The woman may now, like any other *feme sole*, sue and be sued.<sup>5</sup> She can even maintain against the man her action at law for the property which was hers before marriage,<sup>6</sup> or for her services during the cohabitation.<sup>7</sup> So, —

<sup>1</sup> Vol. I. § 258, 259, 271–277.

<sup>2</sup> *Anstey v. Manners*, Gow, 10.

<sup>3</sup> *Aughtie v. Aughtie*, 1 Phillim. 201; *Zule v. Zule*, Saxton, 96; *Sellars v. Davis*, 4 Yerg. 503; *Cage v. Acton*, 1 Ld. Raym. 515, 521; *Calloway v. Bryan*, 6 Jones, N. C. 569. And cases cited 2 Bright Hus. & Wife, 365, note (a). And see *Drummond v. Irish*, 52 Iowa, 41.

<sup>4</sup> Ante, § 855; *Reeve Dom. Rel.* 209; *Co. Lit.* 32 a, 33 b; 7 Co. 140.

<sup>5</sup> *Hatchett v. Baddeley*, 2 W. Bl. 1079. See *Lean v. Schutz*, 2 W. Bl. 1195; 2 Bright Hus. & Wife, 366.

<sup>6</sup> Post, § 1608; Anonymous, 1 Dy. 13, pl. 61; *Lawson v. Shotwell*, 27 Missis. 630, 637.

<sup>7</sup> *Blossom v. Barrett*, 37 N. Y. 434, 97 Am. D. 747.

§ 1599. **Settlement.**—If the woman was a pauper, the man's settlement, which the law was supposed to have given her, is no longer hers.<sup>1</sup> And—

§ 1600. **Witness**—(**Confidence of Marriage**).—After the nullity decree, what previously passed between the parties in the confidence of husband and wife is not, as after the dissolution of a valid marriage by death or divorce, protected from disclosure by either while testifying as a witness.<sup>2</sup>

§ 1601. **Third Persons.**—From the parties having held themselves out as husband and wife if the marriage was void,<sup>3</sup> or from the fact that it was at the time of the transaction legally good if it was voidable,<sup>4</sup> third persons under the law of estoppel<sup>5</sup> or otherwise may have obtained rights not to be divested by the nullity decree.<sup>6</sup> Inquiring now for the limits of this doctrine,—

§ 1602. **The Children,**—not having been misled or even consulted about being born, are not within its protection. So that after the nullity decree they are conclusively illegitimate, equally whether the marriage was voidable or void.<sup>7</sup> But—

§ 1603. **A Stranger,**—if in good faith he has had a transaction with the parties to a marriage voidable in the ecclesiastical sense,<sup>8</sup> is entitled to and receives a fair protection against the loss of vested interests from a decree to which he was not a party. Yet even as against him, if, by collusion with him, the husband prior to the sentence gave or sold him goods of the wife, she, on showing the collusion, may reclaim them.<sup>9</sup> In the absence of collusion, we have from the old books the following—

§ 1604. **Rules.**—If, the marriage being voidable, the husband prior to the nullity suit aliened the wife's lands, she may after the sentence and during his life enter under the statute of 32 Hen. 8, c. 28.<sup>10</sup> And it is laid down in Brook<sup>11</sup> that things executed, where the husband is seised in right of the wife, shall not be avoided by a sentence of nullity; as, waste, receipt of rent, seisin of ward, presentment to a benefice, gift of goods to the

<sup>1</sup> Reading v. Ludlow, 43 Vt. 628.

<sup>2</sup> Wells v. Fletcher, 5 Car. & P. 12; s. c. nom. Wells v. Fisher, 1 Moody & R. 99.

<sup>3</sup> Vol. I. § 1150, 1199.

<sup>4</sup> Vol. I. § 259, 266, 271.

<sup>5</sup> Bishop Con. § 284.

<sup>6</sup> Cage v. Acton, 1 Ld. Raym. 515, 521.

<sup>7</sup> Vol. I. § 272, 277; Gibs. Cod. 446.

<sup>8</sup> Vol. I. § 254, 259, 271, 286.

<sup>9</sup> Br. Deraignment & Divorce, pl. 10; 2 Bright Hus. & Wife, 365.

<sup>10</sup> 1 Bright Hus. & Wife, 165; 2 Ib. 365; Co. Lit. 326 a. As to Michigan, see Johnson v. Johnson, Walk. Mich. 309.

<sup>11</sup> Br. Deraignment, &c. pl. 18.

wife, &c. But that otherwise it is in matter of inheritance; as, if the husband discontinues or charges land of his wife, releases or manumits vellein, &c.<sup>1</sup>

§ 1605. **Creditors.** — After a marriage has been declared void by judicial sentence, it is too late for the husband's creditors to come in and take the wife's property for his debts, whatever they might have done before.<sup>2</sup>

§ 1606. **Wife's Debts.** — A husband's liability to third persons for debts contracted by the wife ceases on the marriage being judicially declared void.<sup>3</sup>

§ 1607. **Third Person and originally Void Marriage.** — Some of the foregoing illustrations of doctrine are limited to cases where the marriage was canonically voidable, — a sort of marriage which our statutes have rendered less frequent than it formerly was in England. Plainly, under the common-law rules, if while such a marriage is in existence the wife receives a chattel in gift to her, and the husband sells it, the purchaser will acquire a title which cannot be divested by a decree of nullity.<sup>4</sup> But an infant girl having in good faith married a man who had a former wife living, the marriage therefore being void, and her father, ignorant likewise of the impediment, having given her a slave, — it was held, not only that the gift invested the husband with no title thereto, but that though he afterward sold the slave with her consent, she being still in her minority, the sale conveyed as against her no title to the purchaser.<sup>5</sup>

§ 1608. **The Woman,** — deceived by the man into a marriage which is void, — as, for example, where unknown to her he has a former wife living, — may upon bill in equity compel him to account for the rents and profits of the property he took under the supposed marriage, and redeliver it to her with its proceeds, retaining for himself the benefit of his improvements.<sup>6</sup> And at law she can enforce from him compensation for her services during the cohabitation.<sup>7</sup> Or, after his death, she can maintain the like claim against his estate in the hands of his legal representatives.<sup>8</sup> Also it has been held that in these circumstances she can recover of the estate a compensation, not only for such

<sup>1</sup> 2 Bright Hus. & Wife, 364.

<sup>2</sup> Kelly v. Scott, 5 Grat. 479.

<sup>3</sup> Anstey v. Manners, Gow. 10.

<sup>4</sup> Ante, § 1603.

<sup>5</sup> Sellars v. Davis, 4 Yerg. 503.

<sup>6</sup> Young v. Naylor, 1 Hill Eq. 383; ante, § 802, 804.

<sup>7</sup> Ante, § 1598; Blossom v. Barrett, 37 N. Y. 434, 97 Am. D. 747.

<sup>8</sup> Higgins v. Breen, 9 Misso. 497.

services, but for the use of her furniture and the hire of her negroes, together with the money which he received from her in his lifetime, and money which after his death she as his executrix had paid to his creditors previously to the time when the letters were revoked on the appearance of the former wife; for "she has a right to be indemnified against the consequences of the deceit."<sup>1</sup>

§ 1609. *The Doctrine of this Chapter restated.*

A decree declaring a marriage void from the beginning, whether theretofore it had been in law void or voidable, remits the parties back to their antenuptial status. And, as between themselves, it makes their respective property rights what they were before the marriage. But if the marriage was voidable in the ecclesiastical sense, so that until avoided it was good, all transactions in good faith whereby property was transmitted to third persons, will be good as to such persons. If before sentence the marriage was void, such third persons may still have acquired rights by estoppel. Yet in the absence of estoppel they cannot generally, perhaps they can never, retain what they could not if there had been no pretence of marriage.

<sup>1</sup> Fox v. Dawson's Curator, 8 Mart. La. 94.

## CHAPTER LI.

## THE DIVORCE FROM THE BOND OF MATRIMONY.

- § 1610, 1611. Introduction.  
 1612-1622. As to Status of the Parties.  
 1623-1669. As to Property and Personal Rights.  
 1670. Doctrine of Chapter restated.

§ 1610. **Cases — Principles.** — The principles of our unwritten law, duly interpreted and applied, furnish a solution for all new questions, in whatever department arising. But the direct adjudications on the subject of this chapter are comparatively few, are mostly modern, and chiefly American. For in England, prior to 1858, judicial dissolutions of marriages originally valid were unknown, unless we except the very early periods whereof the records transmitted to us are too meagre and indistinct to afford practical help.<sup>1</sup> When Parliament dissolved such a marriage by special act, the consequence, it has been said, “does not very clearly appear.”<sup>2</sup> So that from the mother country we have not much judicial assistance on these questions. Our statutes have to some extent made up the deficiency, and our decisions are growing in number and value.

§ 1611. **How Chapter divided.** — We shall consider the resultings from the decree dissolving a valid marriage, I. As to the Status of the Parties; II. As to Property and Personal Rights.

I. *As to the Status of the Parties.*

§ 1612. **Already,** — to make distinct the explanations of preceding topics,<sup>3</sup> it has become necessary to ventilate pretty fully the leading doctrine of this sub-title; namely, that —

<sup>1</sup> Vol. I. § 1495-1499.

<sup>2</sup> 2 Bright Hus. & Wife, 366.

<sup>3</sup> Vol. I. § 575, 698-702, 837; ante,

§ 46, note (par. 4), 137, 153-158.



§ 1613. **Married or Single.** — The law knows only two forms of status as to matrimony, — married, single. A man who has a wife, or a woman who has a husband, is married. One without a husband or wife is not married, — is single. And it is immaterial to this proposition whether or not either or both were once married, and whether the dissolution of a former marriage was by death or divorce. Taking one party out of the marriage, by whatever means, leaves the other single. A husband without a wife, or a wife without a husband, is unknown to the law. This is elementary doctrine, of the class of the self-evident, yet to some judges it has proved “glare ice,” upon which they slipped and fell. No judicial person ever denied this doctrine, but because of its simplicity it is sometimes overlooked. Thus, —

§ 1614. “**Parliamentary Bills of Divorce,**” — says Shelford, “usually declare that the bond of matrimony between the parties shall be wholly dissolved, annulled, vacated, and made void to all intents and purposes whatsoever. But express authority to contract a new marriage is given only to the injured party, — making it lawful for such party to marry again, and declaring that the children born in such matrimony shall be legitimate. There is no similar provision for the future marriage of the offending party. It seems more than probable that in the early instances of these divorces, it was not supposed or adverted to that the permission to contract a new marriage could extend to the adulteress. But the subsequent and long acquiescence seems to have established such marriages, or at least entitled them to be established, if any doubt should arise respecting their validity. It is indeed difficult to understand how a marriage can be dissolved as to one of the parties without being equally dissolved as to the other. And perhaps it may be concluded that divorce bills, as now worded, though purporting only to relieve the injured party, are a complete dissolution of the marriage; of which dissolution the adulteress may legally avail herself, unless expressly prohibited by some act of the legislature. This point was much discussed in the House of Lords in the year 1800; and although the preponderating opinion seemed to be in favor of the validity of the marriage between the guilty parties, yet some of the speakers entertained doubts.”<sup>1</sup> Now, —

<sup>1</sup> Shelf. Mar. & Div. 476. And see *Chichester v. Mure*, 3 Swab. & T. 223, stated in part, Vol. I. § 436.

§ 1615. **Marriage after Divorce.** — In this country, in spite of an occasional cloud upon the judicial understanding, it is the established doctrine, and there is believed to be at the present time no English opinion to the contrary, that after a decree dissolving a valid marriage each of the parties is free to remarry, unless there is a statute directly prohibiting, — the decree even though by its terms releasing only one of the parties from the marriage, operating consequentially the same on the other also.<sup>1</sup> But —

§ 1616. **Complete.** — The divorce to have this effect must be complete;<sup>2</sup> as, if the sentence is open until the expiration of a time for appeal,<sup>3</sup> or until the decree *nisi* is made absolute,<sup>4</sup> a marriage celebrated while it thus remains will be invalid.

§ 1617. **Polygamy — Adultery.** — In illustration of the absolute termination of the marriage on divorce, if a statute prohibits the guilty party to marry again and he does marry, he may be punished criminally under the particular provision, but not under one against either polygamy or adultery. Having ceased to be a married person, — having, if a man, no longer a wife, — he can commit no offence against the woman who once was, yet is not now, his wife.<sup>5</sup> In one case, “it was urged,” said Selden, J., “that while the dissolution of the marriage by the decree was total and absolute on the part of the complainant, it was only partial as to the defendant, who remained subject to a portion of the restraints arising from the marriage contract. In answer to this it may be said that the obligations of the marriage relation are mutual, and the abrogation of them on one side necessarily involves their annihilation upon the other.”<sup>6</sup>

§ 1618. **Not Extra-territorial.** — Statutes take effect only in the country of their enactment. They do not so much as bind citizens abroad except by express words.<sup>7</sup> Therefore a prohibition to the guilty party in divorce to contract a second marriage<sup>8</sup> is

<sup>1</sup> Vol. I. § 702, and the other places cited ante, § 1612; *Wilson v. Holt*, 83 Ala. 528, 3 Am. St. 768; *Van Voorhis v. Brintnall*, 86 N. Y. 18; *Moore v. Hegeman*, 92 N. Y. 521, 44 Am. R. 408; *Scott v. Attorney-General*, 11 P. D. 128.

<sup>2</sup> *Dwelly v. Dwelly*, 46 Me. 377; *Merriam v. Wolcott*, 61 How. Pr. 377.

<sup>3</sup> Vol. I. § 436; *Wilhite v. Wilhite*, 41 Kan. 154; *Warter v. Warter*, 15 P. D. 152.

<sup>4</sup> *Cook v. Cook*, 144 Mass. 163.

<sup>5</sup> *Bishop Stat. Crimes*, § 604 *a*, 666;

ante, § 150, 153–158; *C. v. Putnam*, 1 Pick. 136; *S. v. Weatherby*, 43 Me. 258, 69 Am. D. 59; *P. v. Hovey*, 5 Barb. 117. And see *Dickson v. Dickson*, 1 Yerg. 110, 115, 24 Am. D. 444; *Calloway v. Bryan*, 6 Jones, N. C. 569; *Baker v. P. 2 Hill*, N. Y. 325; *P. v. Faber*, 92 N. Y. 146, 44 Am. R. 357.

<sup>6</sup> *P. v. Hovey*, 5 Barb. 117, 118, 119.

<sup>7</sup> Vol. I. § 866, 867.

<sup>8</sup> Vol. I. § 703, 707.

without effect outside of the territorial limits of the prohibiting State.<sup>1</sup> And this is so even under special statutory terms; as,—

§ 1619. “**Not release Offender.**” — A Kentucky statute declared that the divorce for which it provided “shall not operate so as to release the offending party, who shall nevertheless remain subject to all the pains and penalties which the law prescribes against a marriage while a former husband or wife is living.”<sup>2</sup> Thereupon an offending woman, whose husband had procured the dissolution decree, removed to Tennessee, and there married. The Tennessee Court held this marriage to be good, Catron, J., observing: “I have with much perseverance examined and endeavored to find some legal principle that would avoid the marriage; . . . but, to my great regret, I have not been able to find any such principle. I will therefore briefly state what I have found the law clearly to be. . . . Mary May was legally divorced from her husband, Benjamin May, by the Union Circuit Court of Kentucky, being a court of competent jurisdiction over the subject-matter and the parties; the decree dissolving the marriage is conclusive on all the world.”<sup>3</sup> The statute of Kentucky provides that [she] shall not be released from the marriage contract, but shall be subject to all the pains and penalties of bigamy. It is impossible in the nature of things that all the relations of wife shall exist when she has no husband, who, as soon as the decree dissolving the marriage was pronounced, was an unmarried and single man, freed from all connections and relations to his former wife; and equally so was the petitioner [Mary] freed from all marriage ties and relations to Benjamin May, in reference to whom she stood like unto every man in the community. Therefore *he* has no right to complain of the second marriage; who has? Not the Commonwealth of Kentucky, whose penal laws cannot extend beyond her own territorial jurisdiction, and cannot be executed or noticed in this State, where the second marriage took place, and the violation of said

<sup>1</sup> Vol. I. § 869; *Reed v. Hudson*, 13 Ala. 570, 572; *Fuller v. Fuller*, 40 Ala. 301; *C. v. Low*, 113 Mass. 458; *Van Storch v. Griffin*, 71 Pa. 240; *Van Voorhis v. Brintnall*, 86 N. Y. 18; *Moore v. Hegeman*, 92 N. Y. 521, 44 Am. R. 408; *Scott v. Attorney-General*, 11 P. D. 128. And see *Bullock v. Bullock*, 122 Mass. 3. See

*Marshall v. Marshall*, 4 Thomp. & C. 449, 2 Hun, 238, 48 How. Pr. 57.

<sup>2</sup> See *Cox v. Combs*, 8 B. Monr. 231.

<sup>3</sup> *Roach v. Garvan*, 1 Ves. Sen. 157; *Burrows v. Jemino*, 2 Stra. 733; *Rex v. Roche*, 1 Leach, 4th ed. 134; *Mills v. Duryee*, 7 Cranch, 481; *Grant v. Melachlin*, 4 Johns. 34.

laws was effected.<sup>1</sup> Had Mary May married a second time in Kentucky, such marriage would not be void because she continued the wife of Benjamin May, but because such second marriage in that State would have been in violation of a highly penal law against bigamy; it being a well-settled principle of law that any contract which violates the penal laws of the country where made shall be void. The inquiry with this court is not, however, and cannot be, whether the laws of Kentucky have been violated by this second marriage, but, have our own laws been violated? The Act of 1820, c. 18, against bigamy, declares it felony for any person to marry having a former husband or wife living. Mary May had no husband living, and is not guilty of bigamy by our statute; nor has she violated the sanction of any penal law of this State. No principle of comity amongst neighboring communities can be extended to give force and effect to the penal laws of the one society ex-territorially of the other; and for many reasons it would be equally inconvenient, not to say impracticable, to adopt the principle among sister States of the American Union; for which this court has the conclusive authority of the Supreme Court of the United States.”<sup>2</sup> So, in spite of the Kentucky statute under which this woman was divorced, and of the Tennessee one which made it felony for a person having a former husband or wife living to marry, the court affirmed the validity of her marriage. She had no former husband living, and she violated no law.<sup>3</sup> This case, it is perceived, affirms not only that this sort of statute is not extra-territorial, but likewise that it—

§ 1620. **Does not apply to Foreign Divorce.**—The prohibition we are contemplating is penal.<sup>4</sup> And penal statutes are by construction restricted to what is done within the territorial limits and jurisdiction of the country enacting them.<sup>5</sup> So that however general the terms of the forbidding statute, it is applied only to domestic divorces, not to those rendered in other States and

<sup>1</sup> *Folliott v. Ogden*, 1 H. Bl. 123, 135; *Houston v. Moore*, 5 Wheat. 1, 69; *C. v. Green*, 17 Mass. 515, 540; *Scoville v. Canfield*, 14 Johns. 338, 7 Am. D. 467; *U. S. v. Lathrop*, 17 Johns. 4.

<sup>2</sup> In *Houston v. Moore*, *supra*, at p. 68.

<sup>3</sup> *Dickson v. Dickson*, 1 Yerg. 110, 114, 115, 24 Am. D. 444. And see *Putnam v. Putnam*, 8 Pick. 433; *West Cambridge v.*

*Lexington*, 1 Pick. 506, 11 Am. D. 231; *Ponsford v. Johnson*, 2 Blatch. 51. But see *dicta* in *Williams v. Oates*, 5 Ire. 535, and *Mansfield v. McIntyre*, 10 Ohio, 27.

<sup>4</sup> Vol. I. § 707.

<sup>5</sup> *Bishop Stat. Crimes*, § 141; *Hildreth v. Heath*, 1 Bradw. 82; *P. v. Cæsar*, 1 Par. Cr. 645.

countries.<sup>1</sup> Special statutory terms in New York, into which it is not deemed important here to inquire, appear to have been there regarded as applicable to persons divorced in other States, — admittedly contrary to the general rule.<sup>2</sup>

§ 1621. **Whether Prohibition renders Marriage Void.** — The query is stated in the first volume,<sup>3</sup> whether, in the absence of a clause of nullity in the statute, the marriage which it forbids to the divorced party is void, or whether the prohibition is to be regarded as a penalty only, leaving the marriage valid. We have intimations adverse to the latter view,<sup>4</sup> which has little support from direct authority; but the circumstances differ, and it is deemed best to leave the question to stand on the former expositions.<sup>5</sup>

§ 1622. **Name.** — The rule of law and custom is familiar, that marriage confers on the woman the husband's surname. If it is declared void from the beginning, her maiden name returns to her.<sup>6</sup> But a dissolution for a cause subsequent to the nuptials leaves the husband's surname still hers.<sup>7</sup> In some of our States, the statutes authorize the divorcing court to permit the woman to resume her maiden name.

## II. *As to Property and Personal Rights.*

§ 1623. **Doctrine in General.** — The sentence we are considering, so far from undoing the original marriage, expressly affirms it.<sup>8</sup> It does not, therefore, restore the parties to their former condition, but places them in a new one. Yet as we saw in the

<sup>1</sup> Clark v. Clark, 8 Cush. 385; Ponsford v. Johnson, 2 Blatch. 51; Moore v. Hegeman, 92 N. Y. 521, 44 Am. R. 408; Webb's Estate, Tucker, 372, Bullock v. Bullock, 122 Mass. 3; West Cambridge v. Lexington, 1 Pick. 506, 510, 11 Am. D. 231. "The statutory declaration that the delinquent party shall never marry again without incurring the penalties denounced for bigamous connections, could not have been intended to apply to husbands who had never been either citizens or domiciled residents of Kentucky." Maguire v. Maguire, 7 Dana, 181, 187. And see Vol. I. § 869; C. v. Hunt, 4 Cush. 49; C. v. Green, 17 Mass. 515; 1 Greenl. Ev. § 376; Morgan v. Pettit, 3 Scam. 529.

<sup>2</sup> Explained in Moore v. Hegeman,

supra. Compare with Cropsey v. Ogden, 1 Kern. 228, 235, and Smith v. Woodworth, 44 Barb. 198, the reasoning in which cases is open to criticism. 2 Bishop Mar. & Div. 6th ed. § 703.

<sup>3</sup> Vol. I. § 707, 708.

<sup>4</sup> Calloway v. Bryan, 6 Jones, N. C. 569, which compare with Williams v. Oates, 5 Ire. 535, and Park v. Barron, 20 Ga. 702, 65 Am. D. 641; ante, § 1618, which also compare with Vol. I. § 423, 424, 434-436.

<sup>5</sup> Vol. I. § 436, 707, 708.

<sup>6</sup> Within the principle of ante, § 472, 1596-1600.

<sup>7</sup> Fendall v. Goldsmid, 2 P. D. 263.

<sup>8</sup> Ante, § 733, 1527, 1588.

last sub-title, it makes both single, freeing them as effectually from the marriage bond as does the sentence of nullity. It divests neither of any right of property which has vested;<sup>1</sup> but a non-vested, inchoate right will terminate with the *vinculum* on which it depends, unless saved by a statute.<sup>2</sup> To particularize,—

§ 1624. **Sue.**—The woman can sue and be sued;<sup>3</sup> there can even be a litigation at law between her and the late husband.<sup>4</sup> So,—

§ 1625. **Convey.**—After this divorce, the woman may in her own name alone convey her lands.<sup>5</sup> And the husband may make conveyances directly to her.<sup>6</sup>

§ 1626. **Personalty vested in Husband.**—The wife's personal property, reduced to the husband's possession and not restored to her by the decree which dissolves the marriage,<sup>7</sup> remains his after the divorce, the same as before.<sup>8</sup> But—

§ 1627. **In Action—Non-vested.**—Subject to the actual or presumed adjustments between the parties made on the award of alimony and the division of the property,<sup>9</sup> any right of action which the one may have against the other, or claim in the nature thereof, survives the divorce, freed from marriage-law entanglements. For example, if the woman holds the man's promissory note, given her under circumstances to render it valid, she may sue it after the divorce.<sup>10</sup> Or if during the marriage the woman invested the man's money in stocks in her own name, he may after the divorce recover them or their value in the proper suit against her.<sup>11</sup> This sort of doctrine presents itself in many forms. While, on the one hand, the divorce leaves unimpaired the right which existed before, and while it may even enhance the remedy, on the other hand, it creates no right.<sup>12</sup>

<sup>1</sup> Richardson v. Richardson, 75 Me. 570, 46 Am. R. 428.

<sup>2</sup> American Legion of Honor v. Smith, 18 Stew. Ch. 466.

<sup>3</sup> Gibson v. Gibson, 46 Wis. 449; Calderwood v. Pyser, 31 Cal. 333.

<sup>4</sup> Webster v. Webster, 58 Me. 139, 4 Am. R. 253.

<sup>5</sup> Piper v. May, 51 Ind. 283.

<sup>6</sup> Grupe v. Byers, 73 Cal. 271.

<sup>7</sup> Ante, § 1140 et seq.

<sup>8</sup> Lawson v. Shotwell, 27 Missis. 630, 636.

<sup>9</sup> Patton v. Loughridge, 49 Iowa, 218; Behrley v. Behrley, 93 Ind. 255; Tatrow v. Tatrow, 18 Neb. 395, 53 Am. R. 820.

<sup>10</sup> Webster v. Webster, 58 Me. 139, 4 Am. R. 253.

<sup>11</sup> Lane v. Lane, 80 Me. 570.

<sup>12</sup> Goldsmith v. Union Mut. Life Ins. Co. 15 Abb. N. Cas. 409; Lane v. Lane, 76 Me. 521; Tension v. Tension, 114 Ind. 424; Edwards v. Brown, 68 Tex. 329; Emmert v. Hays, 89 Ill. 11. **Home-stead**,—effect on the, Stahl v. Stahl, 114 Ill. 375; Stockton v. Knock, 73 Cal.

§ 1628. **Not Widow.**—On the man's death the woman is not his widow, therefore no rights which the law gives to widows are hers.<sup>1</sup>

§ 1629. **Not Wife.**—The woman, on this divorce, ceases to be a "wife." So that now she cannot take what is conveyed to her simply as wife, but she can what is made payable to her by name, though with the added description of wife.<sup>2</sup>

§ 1630. **Settlement.**—This divorce does not remit the woman back to her independent settlement, like the decree of nullity,<sup>3</sup> but she takes the settlement which was her husband's when it was pronounced.<sup>4</sup>

§ 1631. *Dower* :—

In another Work,—the author has explained the law of dower,<sup>5</sup> except as to the effect of divorce thereon.

§ 1632. **Subsisting Marriage and Husband's Death.**—It is a fundamental rule in the unwritten law of dower that though the lands of which the woman is to be endowed need not have remained in the husband's ownership until his death, the marriage must be then subsisting.<sup>6</sup> And the reason is that dower is in law a maintenance from the husband to the wife, to be enjoyed by her when death has taken from him the power to render it through his personal exertions. By our unwritten law, when a man in any way, therefore by divorce, ceases to be the husband of a woman, his duty actively to maintain her, or to contribute thereto, ends.<sup>7</sup> Hence,—

§ 1633. **No Dower after Dissolution.**—It would be a strange

425; *Rendleman v. Rendleman*, 118 Ill. 257; *Blandy v. Asher*, 72 Mo. 27; *Burkett v. Burkett*, 78 Cal. 310, 12 Am. St. 58. **Community**,—effect on, *Succession of Breaux*, 38 La. An. 728; *Kimple v. Conway*, 75 Cal. 413; *Stockton v. Knock*, supra; *Edwards v. Brown*, supra. See also on the general subject, *Winn v. Sanford*, 148 Mass. 39; *Wilson v. Merrill*, 38 Mich. 707.

<sup>1</sup> *Dobson v. Butler*, 17 Mo. 87; *Chenowith v. Chenowith*, 14 Ind. 2; *Bell v. Smalley*, 18 Stew. Ch. 478; *Tyler v. Odd Fellows Mut. Rel. Assoc.* 145 Mass. 134; *In re Ensign*, 37 Hun, 152. **Louisiana.**—For consequences in Louisiana, see *Bonvillain v. Bourg*, 16 La. An. 363; *Succession of Ewing*, 15 La. An. 416; *Decuir v. Le-*

*jeune*, 15 La. An. 569; *Succession of Piniger*, 25 La. An. 53. In Missouri, in view of the Louisiana laws, *Depas v. Mayo*, 11 Misso. 314, 49 Am. D. 88.

<sup>2</sup> *In re Morrieson*, 40 Ch. D. 30, not approving *Bullmore v. Wynter*, 22 Ch. D. 619; *Richardson v. Richardson*, 75 Me. 570, 46 Am. R. 428; *Tyler v. Odd Fellows Mut. Rel. Assoc.* 145 Mass. 134.

<sup>3</sup> Ante, § 1599.

<sup>4</sup> *Lake District v. South Canaan*, 87 Pa. 19.

<sup>5</sup> 1 Bishop Mar. Women, § 239-470.

<sup>6</sup> Britton and others as quoted Vol. I. § 1498, note; Co. Lit. 32 a; *Frampton v. Stephens*, 21 Ch. D. 164, and the old authorities there cited.

<sup>7</sup> Ante, § 854, 855, 857.

thing for the law to cast on the lands of a husband, after his decease, an obligation which did not rest on his person while living. Therefore it has become established doctrine that in the absence of a contrary direction from a statute, no woman can have dower unless she was the wife of the man when he died. A further reason for which appears to be that as the English common law never recognized dower unless the woman were covert of the man at his death, our courts cannot create the right by construction, merely because in consequence of legislation she is found in circumstances unknown to the common law.<sup>1</sup> Besides,—

§ 1634. **Non-vested.**—Dower not being an interest in any way vested in the wife, but a mere inchoate right derivable from the marriage,<sup>2</sup> it is within the ordinary rule whereby non-vested interests are ended by divorce.<sup>3</sup>

§ 1635. **In New York,**—the course of this judicial question has been singular. It was adjudged that the divorce took away dower, precisely as above explained; because in such a case the marriage was not, as the law of dower required, “subsisting at the death of the husband.”<sup>4</sup> Afterward, and after the same had been decided in so many of the other States as to become established doctrine from which no dissent was ever known, the question arose again in this State, supposed to be for the first time. It travelled through the Supreme Court, where it was passed upon by a divided bench, into the Court of Appeals, without any reference being made in either tribunal, by the counsel or by any of the judges, to the prior determination in this State, to any one of the other American direct adjudications, or to any of the numerous illustrative decisions respecting the husband’s rights to the wife’s *choses in action* and to curtesy. “The question,” said the judge who pronounced the final opinion, “is entirely new.” In the Supreme Court, the majority sustained what we

<sup>1</sup> *Frampton v. Stephens*, 21 Ch. D. 164; *Boyles v. Latham*, 61 Iowa, 174; *Barrett v. Failing*, 111 U. S. 523; *Given v. Marr*, 27 Me. 212; *McCafferty v. McCafferty*, 8 Blackf. 218; *Clark v. Clark*, 6 Watts & S. 85, 88; 4 Kent Com. 53, note, 54; *Levins v. Sleator*, 2 Greene, Iowa, 604; *Cunningham v. Cunningham*, 2 Ind. 233; *Whitsell v. Mills*, 6 Ind. 229; *Billarn v. Hercklebrath*, 23 Ind. 71; *Miltimore v. Miltimore*, 40 Pa. 151; *Burdick v. Briggs*, 11 Wis.

126; *Rice v. Lumley*, 10 Ohio St. 596; *McCraney v. McCraney*, 5 Iowa, 232, 68 Am. D. 702; *Calame v. Calame*, 9 C. E. Green, 440; *Gleason v. Emerson*, 51 N. H. 405. And see *Lash v. Lash*, 58 Ind. 526; *Jordan v. Clark*, 81 Ill. 465.

<sup>2</sup> 1 Bishop Mar. Women, § 239; *Barbour v. Barbour*, 46 Me. 9.

<sup>3</sup> Ante, § 1623, 1627.

<sup>4</sup> *Charrnaud v. Charrnaud*, 1 N. Y. Leg. Obs. 134.



have seen to be the general doctrine; but in the Court of Appeals a contrary judgment was rendered, the woman being held entitled to her dower. A reading of the opinions makes it plain that if the case had been duly argued, with references to prior adjudications, the result would have been the other way. Yet it is just to add that in the tribunal of last resort the determination was placed somewhat upon the statutes. The divorce had been granted on the wife's prayer. Had she been the guilty party, the express words of the statute would have deprived her of dower. "But," said the court, "if upon the dissolution of the marriage under the provisions of the statute, the wife, whether she be complainant or defendant, be divested of her dowerable capacity, why declare expressly this forfeiture of the right when the wife is the guilty party? If it was the intention of the legislature that in case of a divorce under the statute, the wife should in no event be entitled to dower, why not make the provision general, instead of depriving the wife of dower only in case of her being convicted of adultery? *Expressio unius exclusio alterius*." <sup>1</sup>

§ 1636. **Statutes.** — pretty widely in our States, have changed the unwritten rule when the wife is the innocent party in the divorce, by providing that she shall be entitled to dower in the lands of the husband, in most of them immediately, the same as though he were dead.<sup>2</sup> So likewise we have statutes partly or fully in affirmance of the common-law rule that divorce bars dower.<sup>3</sup>

§ 1637. **Innocent Party.** — The discovery is commonly easy whether or not the wife is the "innocent party," within a pro-

<sup>1</sup> *Wait v. Wait*, 4 Barb. 192, 4 Comst. 95, 101. See also, as recognizing the doctrine of *Wait v. Wait*, *Forrest v. Forrest*, 6 Duer, 102, 153; in which case, the result seems to be based chiefly on the peculiar phraseology of the New York statute. And see *Schiffer v. Pruden*, 39 N. Y. Superior, 167, 64 N. Y. 47; *Kade v. Lauber*, 48 How. Pr. 382, 16 Abb. Pr. n. s. 288; *Van Cleef v. Burns*, 118 N. Y. 549; *In re Ensign*, 37 Hun, 152, 155. As to the effect of the above maxim in general interpretation, see *Bishop Stat. Crimes*, § 249. In *Barrett v. Failing*, 111 U. S. 523, 525, Gray, J. says the decision in *Wait v. Wait* was an interpretation from

the statute. And he refers to *Reynolds v. Reynolds*, 24 Wend. 193.

<sup>2</sup> *Orth v. Orth*, 69 Mich. 158; *Rea v. Rea*, 63 Mich. 257; *Tatro v. Tatro*, 18 Neb. 395, 53 Am. R. 820; *Stahl v. Stahl*, 114 Ill. 375; *Stilson v. Stilson*, 46 Conn. 15; *Seeley's Appeal*, 56 Conn. 202; *Arnold v. Donaldson*, 46 Ohio St. 73, 80; *Bowles v. Hoard*, 71 Mich. 150; *Runnells v. Webber*, 59 Mc. 488; *Lamkin v. Knapp*, 20 Ohio St. 454, and other cases cited as we proceed.

<sup>3</sup> *Hawkins v. Ragsdale*, 80 Ky. 353, 44 Am. R. 483; *Van Cleef v. Burns*, 118 N. Y. 549; *Hinson v. Bush*, 84 Ala. 368; *Rendleman v. Rendleman*, 118 Ill. 257; *McKean v. Brown*, 83 Ky. 208.

vision of the former class. But there was once a decree with the following remarkable and novel clause: "The court being satisfied by the evidence that the complainant and defendant are both guilty of malconduct towards each other, it is therefore ordered, adjudged, and decreed that . . . this divorce is not granted upon the misconduct of the said defendant alone, but *upon the misconduct of both the parties.*" Thereupon the woman was not permitted dower.<sup>1</sup>

§ 1638. **Lands aliened.** — This statutory dower, like that on death, extends as well to lands aliened during the coverture as to those whereof the husband was seised when the marriage terminated.<sup>2</sup> But it does not include lands conveyed by the husband for a valuable consideration before the statute giving it was enacted; for then the purchaser had acquired a vested right, not competent for legislation to take away.<sup>3</sup>

§ 1639. **How recovered.** — By construction this dower is not to be set off to the woman in her divorce suit, but she recovers it by the same means as if the husband had died.<sup>4</sup> For example, she must demand it before bringing her action of dower.<sup>5</sup>

§ 1640. **Foreign Divorce.** — It is a principle in our system of laws that the tenure, transfer, and incidents of lands are under the exclusive control of the law of the State or county in which they are situated.<sup>6</sup> Therefore the question whether or not a woman who has procured or suffered a divorce shall have dower, is determined exclusively by the law of the State wherein the land lies, and it is immaterial whether such law is unwritten or statutory. So that whether it gives or withholds dower, the result from a foreign divorce is the same as from a domestic one. Such is the doctrine in principle; the decisions generally yet perhaps not unanimously accord therewith, though in most of them the true reasoning did not occur<sup>7</sup> to the judicial thought.<sup>8</sup> Emphatically, therefore, a foreign divorce decree which is not

<sup>1</sup> *Cunningham v. Cunningham*, 2 Ind. 233, 234.

<sup>2</sup> *Davol v. Howland*, 14 Mass. 219; *Harding v. Alden*, 9 Greenl. 140, 23 Am. D. 549.

<sup>3</sup> *McCafferty v. McCafferty*, 8 Blackf. 218; *Given v. Marr*, 27 Me. 212; *Comly v. Strader, Smith*, Ind. 75, 1 Ind. 134; *Curtis v. Hobart*, 41 Me. 230. See also *Whitell v. Mills*, 6 Ind. 229.

<sup>4</sup> Ante, § 1522; *Smith v. Smith*, 13 Mass. 231.

<sup>5</sup> *Merrill v. Shattuck*, 55 Me. 370.

<sup>6</sup> *Bishop Non-Con. Law*, § 1279.

<sup>7</sup> Ante, § 922 and places there referred to, 1223.

<sup>8</sup> *McGill v. Deming*, 44 Ohio St. 645; *Hawkins v. Ragsdale*, 80 Ky. 353, 44 Am. R. 483; *Van Cleef v. Burns*, 118 N. Y. 549; *Harding v. Alden*, 9 Greenl. 140, 145,

recognized as valid in the State wherein is the land will have no effect on dower.<sup>1</sup> If the dower or other like provision for the wife is, contrary to the unwritten rule,<sup>2</sup> to be given simply by award from the divorcing court,<sup>3</sup> it plainly cannot follow from a foreign divorce;<sup>4</sup> for even should the foreign tribunal attempt to confer it, its act therein would be void for want of jurisdiction.

§ 1641. *Husband's Rights in Wife's Lands — Curtesy: —*

**Elsewhere.** — Except as to divorce, the husband's interest in his wife's land as tenant by the curtesy<sup>5</sup> and by the marital right<sup>6</sup> is, by the author, explained in another work.

§ 1642. **Analogous to Dower — (Falls with Marriage).** — The husband's rights in the wife's lands are, as to the present question, analogous to those of the wife in the husband's. All these and other like things are within the principle that what rests on the marriage falls with it, whether third persons are injured or not. Thus, —

§ 1643. **Wife's Realty.** — The husband's interest in the wife's real estate, having no other foundation than the coverture, ceases with it; and the estate reverts to her,<sup>7</sup> even though the divorce is by special legislative act, for a cause unknown to the general law.<sup>8</sup> Immediately on its transpiring, she may recover the possession, not only as against her late husband, but also as against his grantee.<sup>9</sup> Specially as to the technical —

§ 1644. **Curtesy.** — When a married woman has a child capable of taking her estate of inheritance by heirship, the husband becomes tenant thereof by the curtesy initiate. He can now become tenant by the curtesy consummate only by the death of the wife. But if she who was his wife ceases to be such before she dies, there is no death of the wife, therefore no consumma-

23 Am. D. 549; Gould v. Crow, 57 Mo. 200; Hood v. Hood, 110 Mass. 463.

<sup>1</sup> Colvin v. Reed, 55 Pa. 375; Reel v. Elder, 62 Pa. 308; Mansfield v. McIntyre, 10 Ohio, 27, explained in McGill v. Deming, supra, at p. 658, 659.

<sup>2</sup> Ante, § 1639.

<sup>3</sup> Ante, § 1522.

<sup>4</sup> Barrett v. Failing, 111 U. S. 523.

<sup>5</sup> 1 Bishop Mar. Women, § 471-527, 580-585.

<sup>6</sup> Ibid. § 528-579.

<sup>7</sup> Porter v. Porter, 27 Grat. 599. And see Clark v. Slaughter, 38 Missis. 64.

<sup>8</sup> Townsend v. Griffin, 4 Harring. Del. 440; Starr v. Pease, 8 Conn. 541; Wright v. Wright, 2 Md. 429, 56 Am. D. 723. And see post, § 1647.

<sup>9</sup> Ante, § 1638; Townsend v. Griffin, 4 Harring. Del. 440, 442; Starr v. Pease, 8 Conn. 541. And see Harris v. McElroy, 45 Pa. 216; Bunch v. Bunch, 26 Ind. 400; Schoch's Appeal, 33 Pa. 351.

tion of the estate in him.<sup>1</sup> Such is the effect of divorce, not only on real property inheritable from the wife, but also on her mere freeholds; as, lands which she holds in dower by reason of a former marriage.<sup>2</sup> Yet she cannot, after the divorce, maintain the particular form of action called trespass, against the husband's grantee;<sup>3</sup> and the termination of the coverture being the act of the law, the lessee of the husband is entitled to the emblements.<sup>4</sup>

§ 1645. **Statutes**, — in some of the States, may influence this question, but it is believed they do not to a great extent.<sup>5</sup> It was held under the Maine enactments that if on promise of reimbursement from the wife,<sup>6</sup> the husband has made improvements on her land and removed encumbrances, he may after divorce recover from her what is thus his due.<sup>7</sup>

§ 1646. *The Wife's Choses in Action*: —

**In his other Work**, — the author has stated the law of the wife's *choses in action*, except as to divorce.<sup>8</sup>

§ 1647. **Effect of Divorce**. — Under the common law, not speaking of statutes which in these later years have largely superseded it, a husband during the coverture may reduce to his own possession and use the wife's *choses in action*. The right depends on the marriage, and therewith it ends, whether the dissolution is by divorce or by death.<sup>9</sup> If, after the right is extinguished by divorce, he receives money due her in action, she may

<sup>1</sup> Wheeler v. Hotchkiss, 10 Conn. 225; Starr v. Pease, 8 Conn. 541; Barber v. Root, 10 Mass. 260; Renwick v. Renwick, 10 Paige, 420, 424; Cull v. Brown, 5 Blackf. 309; Mattocks v. Stearns, 9 Vt. 326; Burt v. Hurlburt, 16 Vt. 292; Sackett v. Giles, 3 Barb. Ch. 204; Oldham v. Henderson, 5 Dana, 254; Townsend v. Griffin, 4 Harring. Del. 440; Boykin v. Rain, 28 Ala. 332, 65 Am. D. 349; Howey v. Goings, 13 Ill. 95, 54 Am. D. 427; Hays v. Sanderson, 7 Bush, 489; Townsend v. Griffin, 4 Harring. Del. 440, 442; Starr v. Pease, 8 Conn. 541. Contra, Gillespie v. Worford, 2 Coldw. 632, where the husband conveyed the estate before the deroeliction occurred.

<sup>2</sup> Gould v. Webster, 1 Tyler, 409.

<sup>3</sup> Wheeler v. Hotchkiss, 10 Conn. 225.

<sup>4</sup> Gould v. Webster, 1 Tyler, 409; Oldham v. Henderson, 5 Dana, 254.

<sup>5</sup> Schuster v. Schuster, 93 Mo. 438; McKean v. Brown, 83 Ky. 208.

<sup>6</sup> Ante, § 1624, 1627.

<sup>7</sup> Blake v. Blake, 64 Me. 177.

<sup>8</sup> 1 Bishop Mar. Women, § 62-182.

<sup>9</sup> Renwick v. Renwick, 10 Paige, 420, 424; Browning v. Headley, 2 Rob. Va. 340, 40 Am. D. 755; Legg v. Legg, 8 Mass. 99; Fink v. Hake, 6 Watts, 131; Lodge v. Hamilton, 2 S. & R. 491; Wintereast v. Smith, 4 Rawle, 177. See also Clarke v. McCreary, 12 Sm. & M. 347; Price v. Sessions, 3 How. U. S. 624; Holmes v. Holmes, 4 Barb. 295; White v. White, 5 Barb. 474; Wood v. Simmons, 20 Mo. 363; Prole v. Soady, Law Rep. 3 Ch. Ap. 220; Wilkinson v. Gibson, Law Rep. 4 Eq. 162; Hunt v. Thompson, 61 Mo. 148.

recover it of him in a suit at law.<sup>1</sup> The divorce places her in the same situation as his death, regarding this species of property; hence, when a legacy for the wife came into the hands of the husband as executor and trustee, and she afterward on her petition obtained a divorce from the bond of matrimony, it was held that in contemplation of law he had not reduced it into possession, therefore she was entitled to it as against him.<sup>2</sup>

§ 1648. **Husband's Assignee — His Creditor.** — It is not well settled in authority how far, when a husband has assigned his wife's *choses in action* and died, her right to them is cut off.<sup>3</sup> But whatever the rule, it is the same on divorce as on his death.<sup>4</sup> If the assignee for a valuable consideration has the precedence of her,<sup>5</sup> his mere creditor has not.<sup>6</sup> So that one administering on the estate of a divorced wife's deceased father cannot diminish her share in it by showing a loan made by him to the husband during the cohabitation. But the father's advance on her account will reduce her claim.<sup>7</sup> Again, if we assume the husband's assignee to be protected, still his right can never exceed the assignor's, which is to recover the *chose in action*, not absolutely, but subject to her claim for an equitable provision out of it. In determining the amount whereof, the ill-conduct of the husband whereon the divorce was founded may be taken into the account; and in a case wherein, besides such ill-conduct, it appeared that prior to the assignment of the particular *chose in action* he had received and squandered much of her fortune, the court allowed her the whole.<sup>8</sup>

§ 1649. *The Tenancy by Entireties: —*

**Elsewhere** — the author has stated the law of estates by entireties, except as to the effect thereon of divorce.<sup>9</sup>

§ 1650. **Depends on Marriage.** — There are differences of judicial opinion regarding this estate; as, for example, some deem

<sup>1</sup> *Legg v. Legg*, 8 Mass. 99.

<sup>2</sup> *In re Kintzinger's Estate*, 2 Ashm. 455.

<sup>3</sup> 1 Bishop Mar. Women, § 145-155;  
<sup>2</sup> Kent Com. 136 et seq.

<sup>4</sup> Ante, § 1647.

<sup>5</sup> Where a husband assigned the *chose in action* without consideration, then the assignee assigned it for consideration to one ignorant of the facts, then the wife had her divorce, and then the money was paid to the second assignee, she was held

not entitled to recover it of him. *McConnell v. Wenrich*, 16 Pa. 365. But some other authorities do not place the assignee in a better condition than the husband; as, *Wood v. Simmons*, 20 Mo 363.

<sup>6</sup> *Fink v. Hake*, 6 Watts, 131. And see *Lodge v. Hamilton*, 2 S. & R. 491.

<sup>7</sup> *Hake v. Fink*, 9 Watts, 336.

<sup>8</sup> *Browning v. Headley*, 2 Rob. Va. 340, 40 Am. D. 755. See *Page v. Estes*, 19 Pick. 269.

<sup>9</sup> 1 Bishop Mar. Women, § 613-623.

husband and wife incapable of taking lands either jointly or in common, so that whatever the terms of a conveyance to them, they will hold by the entirety. Others permit them to take and hold as joint tenants or tenants in common if the deed is in express words that they shall.<sup>1</sup> But all agree that this tenancy does not and cannot exist where there is no marriage. The consequence is that when the marriage ends by divorce it falls.<sup>2</sup> Now, —

§ 1651. **On Divorce**, — therefore, those who were tenants by the entirety cease to be such. But their land does not revert back to the grantor, nor is it forfeited to the State. So they continue to hold it, unless they have parted with it, and their ownership must be in a form which the law permits. As they cannot now be tenants by the entirety, and as the interests of neither can vest exclusively in the other, the common-law rules which favor joint tenancy would make them joint tenants. But in most of our States there are statutes, contrary to the common law, whereby two persons seised of an estate become presumptively, or in the absence of special words, tenants in common.<sup>3</sup> Therefore it has been held, and the author believes justly, that the effect of a divorce where this legislation prevails is to render the parties tenants in common of what before they held by the entirety.<sup>4</sup> Again, —

§ 1652. **Third Persons in Interest** — (“Not thought of.”) — If before the divorce the husband sold all of the estate which he could sell without his wife’s joining in the deed, or if on an execution against him it was sold for his debt, the purchaser could take simply what he had and no more, and the wife on the divorce would be tenant in common with the purchaser. In numerous places in these volumes, we have considered the disasters resulting from the omission of the court to think of some important thing.<sup>5</sup> So it was in a Tennessee case; an estate by the entirety was during the cohabitation levied upon and sold

<sup>1</sup> Explained in *Mar. Women* as above.

<sup>2</sup> *Enyeart v. Kepler*, 118 Ind. 34, 36, 10 Am. St. 94, 96, where Olds, J. says: “It is the prevailing doctrine that a severance of the marital relation by divorce also severs the estate, and after divorce they no longer hold by entirety, but as joint tenants, or tenants in common, owing to

the different policies of the laws of the States.”

<sup>3</sup> 1 *Bishop Mar. Women*, § 615, 616, 618.

<sup>4</sup> *Harrer v. Wallner*, 80 Ill. 197, 204. And see *In re Benson*, 16 Bankr. Reg. 377; *Baggs v. Baggs*, 55 Ga. 590.

<sup>5</sup> For example, ante, § 922, and places there cited, 1364.

to pay the husband's debt, then came the divorce, and the court held that the purchaser could retain the land until the husband's death, and forever unless after this event she should be living, when it would become hers absolutely. Said the learned judge: "The defendant by his purchase became invested with the right of the husband as it existed at the time of the sale; that is, a right to occupy and to enjoy the profits of the land as owner during the joint lives of the husband and wife, subject to the contingency that if the complainant survives her former husband, his estate will then terminate; but if the husband survives, he will become absolute owner of the whole estate."<sup>1</sup> The thing here not thought of was that at the time of the purchase the husband did not have the right thus broadly stated. We have just seen that the estate by the entirety hung on the marriage, and that the divorce by destroying the marriage destroyed the estate. Hence the husband's interest therein could not after the divorce be what the court thus said it was. And this was just as true at the moment when the sale was made as it could become afterward. And so the law was judicially settled at an early period, and so it has remained ever since. For example, if a husband sells lands without his wife's joining, she may on his death have her dower as against the purchaser, and it is the same of statutory dower given on divorce as of common-law dower.<sup>2</sup> And we have seen that the same principle extends to other like things.<sup>3</sup> Therefore the Illinois Court justly declined to follow this case and held, as against a purchaser from the husband during the coverture, that the divorce made the wife immediately tenant in common with such purchaser.<sup>4</sup>

<sup>1</sup> Ames v. Norman, 4 Sneed, 683, 70 Am. D. 269, 274.

<sup>2</sup> Ante, § 1638.

<sup>3</sup> Ante, § 1642, 1643, 1647, 1648.

<sup>4</sup> Harrer v. Wallner, 80 Ill. 197. **Principles of the Law — The Law's Reasoning — "Every Man's Reasoning" — Legal and Judicial Writings.** — I propose to write here a sort of omnibus note, as the composite heading indicates. If any one passes it over unread, the responsibility will be his, not mine. Those meant to be benefited by it are the numerous class of persons, parcel of the larger class commonly termed lawyers, who suppose that the law consists of im-

mense stacks of decided cases, and of judicial observations which they know, if they ever read many of them, are in every imaginable conflict, — square, triangular, heptangular, *obtuse*, and *flat*. At the time when my "Marriage and Divorce" was originally published, there had been no decision, English or American, on the effect of dissolution upon the tenancy by entireties. The Tennessee case of Ames v. Norman, criticised in the text, was the first one, and the Illinois Harrer v. Wallner followed. But the law of the subject was as absolutely settled before those cases arose as it is now. There are gentlemen who will tell us

§ 1653. *Marriage Settlements and other like Interests : —*

**Distinguished from Varying Settlement.** — Where the court divides on divorce the property of the parties between them, one

that the law has “grown,” and they will add that its later growth in Illinois is different from its earlier in Tennessee. The exact truth is that we have one blunder and one correct decision, but all the growing was done ages ago. When the Tennessee blunder appeared, I made upon it the following exposition: “The purchaser under the execution could stand no better toward the wife, in respect of this land, than did the husband. He could take nothing which was not the husband’s. Since, when a husband sells such an estate and then dies, his grantee does not retain it, but it becomes absolutely the wife’s, her rights are demonstrated to be not inferior to his, or to his grantee’s, or to any third person’s. And it is thus demonstrated that no third person can acquire of the husband what the latter has not. But if the estate were not sold, could the husband thus hold it, after the divorce, to the exclusion of the wife? If he could, then he would have in it a right superior to hers; contrary to the settled law of such an estate, which is, that here husband and wife are equal. She, on the other hand, could not hold it exclusively as against him. Moreover, it could not revert to the grantor; because all his interest had gone out of himself, and the operation of the divorce did not, like a sentence annulling a voidable marriage, extend back beyond the time when it was pronounced; it did not send its influence so far into the past as to efface the grantor’s deed. The result is that two persons, a man and a woman once married but not now, have together the entire ownership of the estate, neither one having a claim superior to the other. While they were in law one person, their interest in it was indivisible; but the law has come and severed their unity of person. Since, therefore, their unity of estate proceeded from and depended on their unity of person, the law, in severing the one, severed also by necessary consequence the other. It took nothing from them or from either. But as they who were one before are two now, the estate which they before held as

one because they were one they now hold severally because they are two; not by entireties, but in joint tenancy or in common. The tenancy by entireties is converted by the divorce into a tenancy not entire, because entire it cannot be, but joint or in common. According to the Tennessee decision, the creditor took, not only what was the husband’s, but something also which was the wife’s. According to the author’s view, the creditor and late wife were, after the divorce, tenants together for their joint lives, probably with remainder to the survivor. But the peculiar form of the severed tenancy, whether to be deemed joint or in common, would seem to depend on the differing policy and laws of the States.” These views, it is seen, were sustained by the Illinois Court in the case which followed their publication. 2 Bishop Mar & Div. § 716. This statement of them is in a different form of words from those I have chosen for the text of these New Commentaries. And the form of words is not precisely the same in the opinion of the Illinois Court as in either. But the three forms are severally a “reasoning of the law” in distinction from what Coke terms “every man’s reasoning.” For the law’s reasoning is not a succession of English, Latin, German, or French sentences, but it is a succession of sequences whereby one thing results from another or a half dozen or dozen others. And the succession of sequences is just as much a settled principle or set of principles, just as much an absolute and fairly defiable certainty, as the sequences of the planets are in the planetary system. No planet ever travelled a second time through exactly the same space as before, and it is not competent for “every man’s reasoning” to predetermine precisely where any one of these apparently wandering orbs will be found at a particular period in the future. But the reasoning of the law of astronomy is competent to this work. We thus see the distinction between the reasoning of astronomy and every man’s reasoning. And the analogy between this



of the processes authorized by statute in England, but not much known with us, is to change the marriage settlement.<sup>1</sup> We are

and the corresponding reasoning about the law is close, almost perfect. A distinction rather apparent than real is that the astronomer, though he looks at the skies, does not go off skylarking. But the lawyer who is more in love with a "decided case" than with his mother's milk, and who looks upon the decided cases as the whole of the law, carefully guarding his understanding against any such idea as that the law embodies an unwritten reasoning superior to specific adjudications of judges on special facts, almost as of course resorts to "every man's reasoning" when he undertakes to handle the cases. The astronomer does not do this sort of thing, because thereby he would lose rank; but lawyers of all dimensions and lustre have the ability to do it without abating one ray of their glory in the legal firmament. To illustrate, — in looking after the case of *Ames v. Norman* in the American Decisions, I was referred to a note to *Hardenbergh v. Hardenbergh*, 18 Am. D. 371, 377, wherein, at p. 382, I came upon the following: "Mr. Bishop, in his recent work on the Law of Married Women, says: 'If real estate is conveyed by deed to a husband and wife, this creates in them a peculiar kind of tenancy, known as tenancy by the entirety, the consequence of which is that during the coverture neither can alien the land to the prejudice of the rights of the other, and on the dissolution of the coverture by the death of one of them the survivor takes the whole. Nothing of this sort is known in respect of personal property. Since the wife cannot own personal property in her possession in her own right, but whatever title she has to such property vests in the husband, if a chattel is given or sold to husband and wife jointly, the title passes wholly to him.' 1 Bishop Mar. Women, § 211. The declaration that nothing in the nature of tenancy by entirety is known in respect to personal property is supported by a single citation. *Polk v. Allen*, 19 Mo. 467. But in a later case in the same State, *Shields v. Stillman*, 48 Mo. 82, 86, a hus-

band and wife were regarded as tenants by entirety of a promissory note. That it is so feebly supported is not attributable to omission to take advantage of whatever may have been available on that side of the question, but to the fact that there are certainly few cases, and in all probability no case in accord with the one on which Mr. Bishop's assertion is based. On the other hand, the reports, English and American, new and old, abound in cases recognizing tenancy by entirety in all kinds of personal estate, and enforcing the right of the surviving husband or wife to the entire property." Now, the reasoning of the law is one absolute and certain thing. But "every man's reasoning" is like the wide gate and broad way whereof we read in the Scriptures, the travellers through which are a multitude, and their steps divergent. A legal writing, whether it is a judicial opinion, an editor's note to it, or a formal treatise, professes to be a picture of a segment, larger or smaller, of the law. If a skilled painter should undertake a picture of "Our Distinguished Senator, his Grounds, and his Dog," he would resort to the reasonings of his art so skilfully that we could see where the dog left off and the senator began. But the numberless pictures by "every man" would differ, yet there would be this great similitude, that few or none of them would catch the nice distinctions of light and shade whereby we could determine which was the senator and which the dog. In like manner, the "man" who made the above extract to show how I blundered in "Married Women" failed to catch a distinction which would have been palpable in any reasoning of the law on the subject. Thus, he speaks as though the two Missouri cases of *Polk v. Allen* and *Shields v. Stillman* were antagonistic. Not only were they not so in fact, but in the latter the opinion of the court states in words that they were not. "These notes," said Currier, J. "were neither real estate nor personal chattels in possession, but *choses in action*, and the surviving joint payee took them by

<sup>1</sup> Ante, § 1126.

here inquiring what results from the dissolution where nothing of this sort is done. And —

§ 1654. **The Rule** — is that rights and interests of the parties, or either of them, which exist independently of the marriage, remain after dissolution as they were before.<sup>1</sup> To this it is im-

survivorship." p. 86. This "man" states that I cited only the one case of *Polk v. Allen* to the proposition which he pronounces erroneous. If, instead of writing "every man's" law, he had taken into the account the law's distinctions, or in any way had followed the law's reasonings, and in this manner had looked into my book, he would have seen that I cited hundreds of cases to the proposition which he pronounces wrong, and other hundreds of cases to the distinction which he failed to see, between the wife's *choses in action* and her chattels, or ordinary personal property, of which I was treating in the chapter from which he made the extract. Without undertaking to count the cases, I stated with abundant references to authorities the elementary doctrine in the common law of husband and wife, that a chattel, as distinguished from a *chose in action*, given, sold, or bequeathed to the wife, or owned by her at the marriage, vests, by the act of marriage or the act which on its face makes it after marriage hers, in the husband. And on the strength of masses of other authorities I showed that this rule does not apply to a *chose in action*, which does not thus vest in him, only he may appropriate to himself the money or other thing which he receives in payment therefor. In like manner, I made it plain from the authorities that, with distinctions not important here to be inquired into, a *chose in action*, payable jointly to husband and wife follows the same rule. Thus are relegated to their proper place the cases which, in this "every man's reasoning" that fails to distinguish the law's lines of doctrine, are set down to overturn what I stated to be the law. I do not assert that there may not be found in all our piles upon piles of legal reports some one case contrary to the doctrine to which this writer takes exception. If there is such a case, it is not law; to make it law it must overturn the whole system of the law of husband

and wife as it has been maintained in the common-law countries for ages and ages past. That the rule of survivorship between husband and wife is admitted as to *choses in action* all know; but if "every man" has become aware that in our language it is termed a tenancy by the entirety, not every lawyer knows it. Having thus before us the distinctions, let us go back a little. I brought forward, as already explained, hundreds of cases to prove that the wife "cannot own personal property in her possession in her own right, but whatever title she has to such property vests in the husband," to quote the very words of the objected-to passage. And I do not think any reader of my book will doubt that, on the authorities, personality conveyed to the husband is at the common law his. So we have the result, palpable even to "every man" and equally so to the lawyer, that at the common law any sort of conveyance of a chattel to the husband makes it his, and any sort of conveyance of a chattel to the wife makes it the husband's; therefore, and here the reasoning is not a hard lift for the mental powers, if the thing is conveyed both to the husband and to the wife, *a fortiori* it becomes his. And here we arrive at a distinction in law-books. It is as wide as that between the picture painted by an artist wherein the other distinction — namely, that between a senator and a dog — appears, and the paintings executed by "every man." In the one class of books, the reasonings of the law are set down; in the other class, those of "every man." I shall not deny that I deem the former the more serviceable; but this is a disputed question among lawyers, and I do not propose to discuss it in this place. Publishers commonly like the "every-man" sort; for if I mistake not, the copyright royalty on them does not come so high.

<sup>1</sup> *Buffaloe v. Whitdeer*, 15 Pa. 182; *Dalton v. Bernardston*, 9 Mass. 201; *West*

material for whose or what fault the divorce was given.<sup>1</sup> We have seen in previous sections of this sub-title that whatever hangs on the marriage falls with it. To illustrate, —

§ 1655. **"During Coverture."** — If, on a settlement or otherwise, money is payable to the wife from time to time during coverture, — in one case, the words were "during the continuance of said marriage," — a dissolution by divorce, terminating the coverture, has the same effect as by death.<sup>2</sup> On the other hand, —

§ 1656. **During Life.** — If instalments of money are payable to a wife during her life, a divorce does not put an end to them, though the idea of supporting her in respect of the marriage may have more or less influenced the provision.<sup>3</sup> Now, —

§ 1657. **Complicated Cases** — are not all soluble by these rules alone. For example, there may be a trust of a sort which equity will supervise,<sup>4</sup> and then equitable principles will enter with those of law into the adjustment.

§ 1658. **Illustrative Instances** — are such as the following. Where, pursuant to an antenuptial agreement, husband and wife had conveyed her real estate to a trustee to be held for her benefit during her life, with a life interest in the husband, and to her heirs on the decease of both, it was held that he lost no rights under this settlement by a divorce from the marriage bond for his fault; so that, surviving her, he was entitled to the use of this property during his life.<sup>5</sup> And where, by a post-

Cambridge v. Lexington, 1 Pick. 506, 11 Am. D. 231. And see McBride v. Greenwood, 11 Ga. 379; Stultz v. Stultz, 107 Ind. 400. In Scotch Law. — In Scotland, on divorce for desertion, all the offender's claims under a marriage settlement, whether antenuptial or postnuptial, are forfeited by the statute of 1573, c. 55, which declares that "the offenders shall tyne and lose tocher and *donationes propter nuptias*." And though the statute is silent as to the effect of the divorce for adultery, the same rule is extended to it by construction. Harvey v. Farquhar, Law Rep. 2 H. L. Sc. 192. And see, on the general question, Mason v. Beattie's Trustees, 6 Scotch Sess. Cas. 4th ser. 37; Argyle v. Tenants, Mor. Dict. 6184; Ritchie v. Ritchie's Trustees, 1 Scotch Sess. Cas. 4th ser. 987.

<sup>1</sup> Fitzgerald v. Chapman, 1 Ch. D. 563, where Jessel, M. R. reviews, but does not

follow, Jessop v. Blake, 3 Giff. 639; Swift v. Wenman, Law Rep. 10 Eq. 15; and Fussell v. Dowding, Law Rep. 14 Eq. 421. As contrary to these cases and controlling them, because from a superior court, he cites Evans v. Carrington, 2 De G. F. & J. 481. And see Burton v. Sturgeon, 2 Ch. D. 318.

<sup>2</sup> Harvard College v. Head, 111 Mass. 209.

<sup>3</sup> McGrath v. Insurance Co. 8 Philad. 113; Galusha v. Galusha, 116 N. Y. 635. I do not see any other cases so direct as these to the plain proposition of the text; but it is within the doctrine of many others, as Fitzgerald v. Chapman, 1 Ch. D. 563; Burton v. Sturgeon, 2 Ch. D. 318; Goslin v. Clark, 12 C. B. n. s. 681; Blaker v. Cooper, 7 S. & R. 500; Bullock v. Zilley, Saxton, 489.

<sup>4</sup> Ireland v. Ireland, 84 N. Y. 321.

<sup>5</sup> Babcock v. Smith, 22 Pick. 61.

nuptial agreement, the husband was to pay to a trustee for the wife's use certain instalments "as alimony for and during the term of her natural life," it was held that the undertaking survived a subsequent divorce, followed by a marriage of the woman to another man.<sup>1</sup> This decision seems but the necessary result of the foregoing rules. Yet it was questioned in New York by Assistant V. C. Hoffman, who said "that a decree for a divorce *a vinculo matrimonii*, for the crime of the wife, annuls every provision made for a wife in marriage articles, or a marriage settlement in the nature of jointure, or otherwise, as well as any provision in articles executed upon a separation." However just this principle might be in legislation, it would be difficult to find for it a foundation in the unwritten law. And in the very case to which this learned person was speaking, where a husband aware of the wife's adultery had in articles of separation covenanted to pay her an annuity, then, after divorce, had for three years continued the payments, and finally had made a new agreement directly with her, secured by mortgage of his real estate, — to foreclose which mortgage she, after contracting a second marriage, brought her bill, — the learned judge sustained her claim.<sup>2</sup>

§ 1659. **Terms of Instrument** — ("Wife" — Name). — A testator provided an annuity for his "nephew Thomas Bullock and Rebecca his wife, and their children." Then, after his death, the marriage between Thomas and Rebecca was dissolved. And she was permitted to maintain against the trustee her bill for a proper part of the annuity. The court deemed that as she was named in the bequest, the word "wife" was descriptive of the person, not of the character in which she was to take. It does not appear what proportion was awarded her.<sup>3</sup>

§ 1660. **Refusing Specific Performance.** — Assuming that in general equity law the court may refuse its aid to an applicant

<sup>1</sup> Blaker v. Cooper, 7 S. & R. 500; s. p. where the wife was the party delinquent, Miller v. Miller, 1 Sandf. Ch. 103. And see Heavyside v. Lardner, 3 Law Reporter, 201, 218, Aug. 1840, before Baron Gurney; Jee v. Thurlow, 4 D. & R. 11; McGowan v. Caldwell, 1 Cranch, C. C. 481, where a divorce *a vinculo*, in which it was declared in the decree that articles previously entered into for alimony should remain in full force, was held to be no

bar to an action on a bond given to secure the performance of those articles.

<sup>2</sup> Charruand v. Charruand, 1 N. Y. Leg. Obs. 134. See also Hastings v. Orde, 11 Sim. 205; Highley v. Allen, 3 Mo. Ap. 521.

<sup>3</sup> Bullock v. Zilley, Saxton, 489. On this general subject, I will here add a few cases: Goslin v. Clark, 12 C. B. n. s. 681; Schoch's Appeal, 33 Pa. 351; Fussell v. Dowding, Law Rep. 14 Eq. 421.

not equitably entitled,<sup>1</sup> it may after a marriage dissolution decline in a proper case to give effect to a mere agreement for a settlement. Thus, where there was an antenuptial contract between the parties and trustees, in which the intended husband covenanted to convey to the latter certain property to be held in trust, &c.; and in case of his death, "leaving the said Mary," then to pay the same to her, with limitations over; then followed a divorce for her fault, then his death,—it was held that a suit in equity for her benefit could not be maintained, to compel specific performance of the agreement. "The marriage," said the court, "is dissolved; and all rights and obligations dependent on the existence of the marriage relation are extinguished. . . . If the estate had been conveyed to the trustee in pursuance of the agreement, it is possible that her right to receive the income would not be lost by the divorce; but upon this question we express no opinion."<sup>2</sup>

§ 1661. **Alimony superseding Settlement.**—A husband, in consideration of his wife's withdrawing a libel for divorce, covenanted in articles of separation to pay a sum yearly to a trustee for her use during her life. Afterward, by a similar libel, she obtained a decree dissolving the marriage. And she had alimony, fixed by agreement at the sum which was payable under the articles. After receiving two instalments of it, she married another man, whereupon the court reduced it to a nominal sum. Then the trustees sued him on his covenant in the articles; but they were held not entitled to recover. It seemed to be admitted that the decree for alimony was, by the understanding of the parties and the court when pronounced, to stand in the stead of the provision in the articles; therefore for this reason, if for no other, they were practically made void by the divorce.<sup>3</sup>

§ 1662. *The Capacity of the Parties to be Witnesses for and against each other:—*

**Ends Incapacity.**—The incapacity of the parties to be witnesses for or against each other, created by the marriage, necessarily terminates when it is dissolved by divorce the same as by death.<sup>4</sup> But —

<sup>1</sup> And see *Charruand v. Charruand*, 1 N. Y. Leg. Obs. 134.

<sup>2</sup> *Clarke v. Lott*, 11 Ill. 105, 114, 115. And see *Cartwright v. Cartwright*, 19 Eng. L. & Eq. 46.

<sup>3</sup> *Albee v. Wyman*, 10 Gray, 222. And

see *Morrison v. Morrison*, 49 N. H. 69; *Stewart v. Stewart*, 43 Ga. 294; *Baggs v. Baggs*, 55 Ga. 590.

<sup>4</sup> *Adams v. Bleakley*, 117 Pa. 283; *Long v. S.* 86 Ala. 36.

§ 1663. **Under Confidence of Marriage.** — Though the marriage is dissolved, it being immaterial whether by death or divorce, the confidences of the past remain under the protection of the law. Not undertaking to trace every minute line of distinction, all facts which came to the knowledge of either party whereof the disclosure would violate the confidence of the matrimonial relation, especially if prejudicial to the other party, are kept perpetually under the protection of the rule of public policy, which, to promote freedom and harmony in matrimonial intercourse, forbids their disclosure in evidence. To these the divorced person cannot testify, to the others he can,<sup>1</sup> — a rule not applicable to the sentence of nullity.<sup>2</sup> And it is the same with a widow as with a woman divorced.<sup>3</sup> To illustrate, and —

§ 1664. **More Particularly.** — After divorce, the late wife cannot testify to conversations with the husband during marriage,<sup>4</sup> or to confidential acts.<sup>5</sup> But, it appears, this protection may be waived by the consent of both parties after a divorce, yet not before;<sup>6</sup> so that if the divorced wife is willing she may be a witness in favor of her late husband to whatever happened during the coverture. This is illustrated when he brings an action for criminal conversation against the adulterer; she is competent to prove the adultery.<sup>7</sup> But by some this is denied.<sup>8</sup> The right of joint waiver has been carried to the extent of permitting the woman to testify to what the husband “could not have

<sup>1</sup> 1 Greenl. Ev. § 334, 335, 338; Owen v. S. 78 Ala. 425, 56 Am. R. 40; Barnes v. Camack, 1 Barb. 392; S. v. J. N. B. 1 Tyler, 36, overruled in S. v. Phelps, 2 Tyler, 374; S. v. Jolly, 3 Dev. & Bat. 110, 32 Am. D. 656; Woolley v. Turner, 13 Ind. 253; Cook v. Grange, 18 Ohio, 526; Kimbrough v. Mitchell, 1 Head, 539; Waddams v. Humphrey, 22 Ill. 661; S. v. Dudley, 7 Wis. 664; Mercer v. Patterson, 41 Ind. 440; Elswick v. C. 13 Bush, 155; Monroe v. Twistleton, Peake Ev. App. ed. of 1822, p. 39, Peake Ad. Cas. 219.

<sup>2</sup> Ante, § 1600.

<sup>3</sup> Stanley v. Montgomery, 102 Ind. 102; Stober v. McCarter, 4 Ohio St. 513; Gaskill v. King, 12 Ire. 211; Cornell v. Varnatsdalen, 4 Pa. 364; Jackson v. Barron, 37 N. H. 494; Smith v. Potter, 27 Vt. 304, 65 Am. D. 198; Edgell v. Bennett, 7 Vt. 534; Williams v. Baldwin, 7 Vt. 503, 506;

Caldwell v. Stuart, 2 Bailey, 574; Gray v. Cole, 5 Harring. Del. 418; Walker v. Sanborn, 46 Me. 470; Short v. Tinsley, 1 Met. Ky. 397, 71 Am. D. 482; Jack v. Russey, 8 Ind. 180; Carpenter v. Dame, 10 Ind. 125; Stein v. Weidman, 20 Mo. 17; Floyd v. Miller, 61 Ind. 224.

<sup>4</sup> Brock v. Brock, 116 Pa. 109.

<sup>5</sup> Perry v. Randall, 83 Ind. 143.

<sup>6</sup> Barker v. Dixie, Cas. temp. Hardw. 264; 2 Dan. Ch. Pract. Perkins's ed. 988; 1 Greenl. Ev. § 340. Yet see Merriam v. Hartford, &c. Rld. 20 Conn. 354, 52 Am. D. 344.

<sup>7</sup> Ratcliff v. Wales, 1 Hill, N. Y. 63; Dickerman v. Graves, 6 Cush. 308, 53 Am. D. 41; Wottrich v. Freeman, 71 N. Y. 601. And see Stanton v. Willson, 3 Day, 37, 3 Am. D. 255; S. v. Dudley, 7 Wis. 664.

<sup>8</sup> Rea v. Tucker, 51 Ill. 110, 99 Am. D. 539.

wished to conceal, but must have desired to make known, through her, if he found no other means of doing so.”<sup>1</sup> In like manner, —

§ 1665. **Statutes.** — If, during coverture, for illustration, a statute takes away the disqualification of interest, the wife, it has been held, may be a witness *for* her husband.<sup>2</sup> But this is no modification of the common-law effects of a divorce. And it is believed that, in general, the influence of the late statutes of evidence is, on this question, not great.<sup>3</sup>

§ 1666. *Torts during Coverture* : —

**As between Divorced and Third Persons.** — The marriage dissolution does not take away the husband’s suit against a third person for previously seducing the wife.<sup>4</sup> It frees him from being joined as defendant in actions for torts committed by her during coverture.<sup>5</sup> On the other hand, if a tort has been inflicted on the wife, — as, if she has been slandered, — and then there is a divorce from the marriage bond, it is plain in principle, and is in a measure sanctioned by authority, that she may sue the wrong-doer in her own name alone, and the late husband should not be joined.<sup>6</sup>

§ 1667. **Between Divorced Parties — (Their Confederates).** — After divorce, the woman cannot recover damages of the man,<sup>7</sup> or even, by one opinion, of his confederate,<sup>8</sup> for assaulting and beating her during the coverture. As to the husband, the marriage having made him and the wife one, he was under no civil liability to her, though subject to an indictment by the State. But a later case does not, like the one last cited, hold the confederate to be consequently protected. And such is deemed to be the better opinion; namely, that because the divorce has given her the capacity to sue alone, she may have damages of the

<sup>1</sup> *S. v. Jolly*, 3 Dev. & Bat. 110, 32 Am. D. 656; *Hester v. Hester*, 4 Dev. 228; *Crook v. Henry*, 25 Wis. 569. And see *Coffin v. Jones*, 13 Pick. 441, 445; *Williams v. Baldwin*, 7 Vt. 503, 506; *Wells v. Tucker*, 3 Binn. 366; *McGuire v. Maloney*, 1 B. Monr. 224; *Aveson v. Kinnauld*, 6 East, 188; *Cornell v. Vanartsdalen*, 4 Pa. 364.

<sup>2</sup> *Merriam v. Hartford, &c.* Rld. 20 Conn. 354, 52 Am. D. 344. And see *Mayrant v. Guignard*, 3 Strob. Eq. 112; *Bisbing v. Graham*, 14 Pa. 14, 53 Am. D. 510.

<sup>3</sup> *Anderson v. Anderson*, 9 Kan. 112; *Herrick v. Odell*, 29 Mich. 47; *Chamberlain v. P.* 23 N. Y. 85, 80 Am. D. 255.

<sup>4</sup> *Ealer v. Flomerfelt*, 1 Wheat. Dig. ed. of 1843, 828, 1 Ashm. 53, note; *Ratcliff v. Wales*, 1 Hill, N. Y. 63; *Dickerman v. Graves*, 6 Cush. 308, 53 Am. D. 41.

<sup>5</sup> *Capel v. Powell*, 17 C. B. N. s. 743.

<sup>6</sup> *Chase v. Chase*, 6 Gray, 157, 159.

<sup>7</sup> *Phillips v. Barnet*, 1 Q. B. D. 436.

<sup>8</sup> *Abbott v. Abbott*, 67 Me. 304, 24 Am. R. 27.

man whom the law did not make one with her.<sup>1</sup> It cannot be pretended that the husband's authorization, which was illegal, justified the third person as a lawful authority would.<sup>2</sup>

§ 1668. *Administration*:—

**Husband's Right.**—Such dissolution takes away the husband's right to administer on his late wife's estate upon her decease. Yet conduct which would have entitled her to a divorce, if she had applied for it, does not have this effect, if in fact no divorce was obtained.<sup>3</sup>

§ 1669. **The Wife's Right**—to administer on the husband's estate is, in like manner, not recognized after the marriage is dissolved by divorce.<sup>4</sup>

### § 1670. *The Doctrine of this Chapter restated.*

The decree dissolving a valid marriage does not operate retrospectively like the nullity one. Instead of declaring that there was never a marriage, it affirms that there was such, and pronounces it thenceforth dissolved. And beyond such provisions about pecuniary things as are introduced into it by authority of a statute or the unwritten law, it neither takes away vested rights nor imposes upon either party new obligations. Non-vested interests, which hang on the marriage, fall with it. The particulars need not be further repeated.

<sup>1</sup> Nickerson v. Nickerson, 65 Tex. 281. see Lodge v. Hamilton, 2 S. & R. 491;

<sup>2</sup> Bishop Non-Con. Law, § 622, 623, Coover's Appeal, 52 Pa. 427.

626 <sup>4</sup> In re Ensign, 103 N. Y. 284, 57 Am.

<sup>3</sup> Altemus's Case, 1 Ashm. 49. And R. 717.



## CHAPTER LII.

## THE DIVORCE FROM BED AND BOARD.

§ 1671. **Already**, — in other connections, we have seen something of the consequence of this bed-and-board divorce.<sup>1</sup>

§ 1672. **In General Terms**, — it authorizes the parties to live in separation, yet leaves the marriage in full force.<sup>2</sup> Therefore, except as specified in the alimony decree or provided for by a statute, it does not change their property rights, or even largely their personal status and powers.<sup>3</sup> We have qualifications of this result; as, —

§ 1673. **In Louisiana**, — the divorce from bed and board is said to separate the parties as effectually as that from the marriage bond, only they cannot marry again.<sup>4</sup> Universally, —

§ 1674. **Remarriage**. — This divorce, whether domestic or foreign, does not authorize the parties to remarry.<sup>5</sup> And not since an early period has it afforded a protection against the indictment for polygamy.<sup>6</sup> As to which, —

§ 1675. **Old Form of Sentence — Bond**. — In England, while the ecclesiastical power governed divorce, the 107th canon of 1603<sup>7</sup> required a clause in the sentence that the parties shall live chastely in separation and not marry others. For the fulfilment whereof, the applicants must bring “good and sufficient caution and security into the court that they will not anyway break or transgress the said restraint or prohibition.”<sup>8</sup> The practice,

<sup>1</sup> Ante, § 468–471, 476, 843.

<sup>2</sup> Ante, § 470.

<sup>3</sup> American Legion of Honor v. Smith, 18 Stew. Ch. 466; Taylor v. Taylor, 93 N. C. 418, 53 Am. R. 460; Castlebury v. Maynard, 95 N. C. 281; Kriger v. Day, 2 Pick. 316; Clark v. Clark, 6 Watts & S. 85; Dean v. Richmond, 5 Pick. 461.

<sup>4</sup> Savoie v. Ignogoso, 7 La. 281, 285. And see Ford v. Kittredge, 26 La. An. 190; Williamson v. Amilton, 13 La. An.

387. But the divorce does not dissolve the marriage. Gee v. Thompson, 11 La. An. 657. And on the death of the husband, the wife can claim the rights of widow. Succession of Liddell, 22 La. An. 9. Effect on the community, Bartoli v. Huguenard, 39 La. An. 411.

<sup>5</sup> Young v. Naylor, 1 Hill Eq. 383; Thompson v. Thompson, 10 Philad. 131.

<sup>6</sup> Vol. I. § 715, 717.

<sup>7</sup> Vol. I. § 102, 103.

<sup>8</sup> Poynter Mar. & Div. 339.

when the husband was promoter, was for him on the cause being assigned for hearing to give a bond in one hundred pounds, with one surety, payable to the judge personally, his executors, and administrators, that he would not at any time thereafter during the life of the defendant marry any other woman; when the wife was promoter, she must have a man execute the bond in her stead.<sup>1</sup> A sentence without the bond was by the 108th canon void. An accidental omission of it could be cured by a later filing of the bond, and the judge signing the sentence anew.<sup>2</sup> As this canon did not bind the laity,<sup>3</sup> it could not in reason be deemed common law with us; nor have we any recorded instance of obedience to it by an American court. In England, the rules of the Divorce Court dispense with the bond.<sup>4</sup>

§ 1676. **Renewing Cohabitation.** — To authorize a renewal of the cohabitation no new marriage is required; neither, it seems, under the general law, are further proceedings in court necessary; but the reconciliation of its own force annuls the sentence of separation. How this particular question stands under various statutory enactments, and under decrees differing in terms from the English, appears not uniformly plain on the authorities.<sup>5</sup>

§ 1677. *As to the Wife's Chattels and Lands:* —

**Dower.** — This divorce neither takes from the wife her dower, nor entitles her to recover it during the life of the husband.<sup>6</sup>

§ 1678. **Husband's Life Estate — Curtesy.** — No interest of the husband in the wife's lands, either during their joint lives or after her death, is taken from him by this divorce.<sup>7</sup> But there are States wherein the statutes<sup>8</sup> entitle the injured wife on this divorce to the immediate possession of her real property. Such a statute does not destroy the matrimonial relation; it only

<sup>1</sup> Coote Ec. Pract. 343, 344.

<sup>2</sup> Dysart v. Dysart, 1 Rob. Ec. 470, 543.

<sup>3</sup> Vol. I. § 103.

<sup>4</sup> Rule 126, Browne Div. Pract. 4th ed. 540.

<sup>5</sup> Ante, § 476; Barrere v. Barrere, 4 Johns. Ch. 187; Thompson v. Thompson, 2 Dall. 128; McKarracher v. McKarracher, 3 Yeates, 56; Stephens v. Totty, Cro. Eliz. 908; Nathans v. Nathans, 2 Philad. 393; Hokamp v. Hagaman, 36 Md. 511; Meehan v. Meehan, 2 Barb. 377.

<sup>6</sup> Park on Dower, 20; Stowell's Case, Godb. 145; Powell v. Weeks, Noy, 108; Godol. Abr. 505; Tebbs on Adultery & Div. 213; Hokamp v. Hagaman, 36 Md. 511; Taylor v. Taylor, 93 N. C. 418, 53 Am. R. 460. And see Potier v. Barclay, 15 Ala. 439; Gee v. Thompson, 11 La. An. 657.

<sup>7</sup> Smoot v. Lecatt, 1 Stew. 590; Rochon v. Lecatt, 2 Stew. 429; Clark v. Clark, 6 Watts & S. 85.

<sup>8</sup> Ante, § 1140-1148.

authorizes her to recover and enjoy her lands, even as against a purchaser or lessee from the husband for a valuable consideration, in like manner as if the coverture were terminated.<sup>1</sup>

§ 1679. *As to the Wife's Choses in Action and Costs:—*

**Choses in Action — (At Law).** — The husband's common-law right to reduce into possession the wife's *choses in action* remains, after this divorce, as before.<sup>2</sup> And he may release a *chose in action* — for example, a legacy — due to her.<sup>3</sup> But —

§ 1680. **Costs.** — He cannot release the wife's costs against himself in the divorce suit; because thereby her right to act therein adversely to him, which the law had conferred on her, would be impaired or defeated.<sup>4</sup> And the like rule will extend to her costs against a third person where there is for it a like reason. Thus, Holt, C. J., after stating the general authority of a husband to release costs which his wife has recovered in the Ecclesiastical Court, added: "But if they are divorced *a mensa et thoro* there, in such case, or of incontinency, &c., he cannot release the costs; and the reason is that if they are divorced *a mensa et thoro* the husband allows his wife alimony, and the costs of the suit are out of the alimony; and therefore he cannot discharge the one more than the other . . . Yet if the suit be there for a legacy devised to the wife, which is originally due to the baron and feme, and is not part of the alimony, he may release the suit and also the costs; because he may discharge the principal."<sup>5</sup> And where, under like circumstances, the suit in the Spiritual Court was for slandering the wife, prohibition was refused; because, said Haughton, J., "this is personal to the wife, and the determination of this is left unto them there"<sup>6</sup>

§ 1681. **In Equity — (Choses in Action),** — the husband's authority over the wife's *choses in action* is, after this divorce, greatly restricted or even practically taken away. As in other circumstances,<sup>7</sup> equity may enforce a settlement on her out of them, or by injunction<sup>8</sup> keep his hands altogether off from them.<sup>9</sup> Where, in New York, a legacy fell to a wife who had a divorce

<sup>1</sup> *Kruger v. Day*, 2 Pick. 316. And see *Page v. Estes*, 19 Pick. 269.

<sup>2</sup> *Ames v. Chew*, 5 Met. 520; *Dean v. Richmond*, 5 Pick. 461.

<sup>3</sup> *Stephens v. Totty*, 1 Cro. Eliz. 908.

<sup>4</sup> *Stevens v. Stevens*, 1 Met. 279.

<sup>5</sup> *Chamberlaine v. Hewson*, 5 Mod. 70.

<sup>6</sup> *Motteram v. Motteram*, 3 Bulst. 264; and see *Gibs. Cod.* 445.

<sup>7</sup> 1 Bishop Mar. Women, § 624-696.

<sup>8</sup> See *Ib.* § 633 et seq.

<sup>9</sup> *Anonymous*, 9 Mod. 43, 44; 2 Bright Hus. & Wife, 363.

from bed and board for the husband's cruelty, the court enjoined him from receiving any part of it, yet intimated that her taking the whole might require a reduction or discontinuance of the alimony. "The rule of the Court of Equity in such cases follows," said Barculo, J., "that of natural justice. The husband by his violation of the marriage contract forfeits all equitable right to the wife's property. Even when the property has belonged to her before the separation, and has not been reduced into actual possession by the husband, courts of equity will restore it to the wife. Much more, in a case like the present, when the property falls to the wife after the separation, should the equitable power of the court be interposed to prevent the husband from receiving it by virtue of that relation which he himself has disregarded and violated. It would be difficult to conceive a more plain and palpable outrage upon justice than to permit this old lady to be deprived of her whole share of her father's estate, by an exercise of his marital rights on the part of a husband whose cruelty has driven her from an honorable home, and occasioned a permanent suspension of the marriage contract. The authorities are full on this subject."<sup>1</sup> But,—

§ 1682. **Rights of Creditors.**—Where, in England, a husband became bankrupt, then the wife had this divorce for his adultery and cruelty, and then a sum fell to her by bequest, she was in equity not allowed the whole of it, though there was no settlement on her at the marriage, and the husband had already received £1,500 stock in her right. This determination was by the Vice-Chancellor put upon the ground that "the whole proceeding was subsequent to the bankruptcy, and consequently after the right to the legacy had vested in the assignees."<sup>2</sup> There is room, both in principle and in authority, to question this decision.<sup>3</sup>

§ 1683. **Statutes**—in some of our States have modified the unwritten rule on this subject. Thus, an early Massachusetts one (we are not inquiring after subsequent changes) directed that on this divorce, when given at the prayer of the wife, her *chooses in action* not reduced to the husband's possession should remain her property. And it was adjudged that his assignment

<sup>1</sup> Holmes v. Holmes, 4 Barb. 295, referring to Van Duzer v. Van Duzer, 6 Paige, 366, 31 Am. D. 257; Fry v. Fry, 7 Paige, 461; Renwick v. Renwick, 10 Paige, 420.

<sup>2</sup> Green v. Otte, 1 Sim. & S. 250, 252. See ante, § 1648, and Browning v. Headley, there cited; Davis v. Newton, 6 Met. 537.

<sup>3</sup> See 1 Bishop Mar. Women, § 678.

of them for a valuable consideration before divorce is not such reduction to possession. She can hold them as against the assignee, who stands only in the place of the husband, with no other rights than his, now terminated by the divorce.<sup>1</sup> And if the divorce decree, made pursuant to statutory authorization, provides, as in a New York case involving other questions,<sup>2</sup> that the husband is divested of all authority over the wife's estate,<sup>3</sup> the same "as if the parties had never been married," it is plain that his right to anything out of her uncollected *choses in action* is gone.

§ 1684. *The Wife's Capacity to sue and be sued* :—

In England,—the common-law courts held that the ecclesiastical divorce from bed and board did not subject the wife to be sued.<sup>4</sup> And we may presume they would not have permitted her to be a plaintiff, though the question appears not to have been decided. But after the "judicial separation" of the later Divorce Court,<sup>5</sup> she is by the express terms of the statute "considered as a *feme sole* for the purposes of contract and wrongs and injuries, and suing and being sued in any civil proceeding."<sup>6</sup>

§ 1685. In our States,—perhaps universally, certainly in most of them, the statutes have given the bed-and-board divorce a somewhat wider effect upon the wife's property and personal rights than it was possible for the ecclesiastical decree to impart. Therefore, in exceptional States by an express legislative provision,<sup>7</sup> and in most of them as a consequence deemed to result from her new relation and powers,<sup>8</sup> she is accorded the capacity to sue and be sued as though not under coverture. There may be States wherein this conclusion is denied or is uncertain.<sup>9</sup>

§ 1686. A Domicil for the Suit—follows of necessity upon the right to sue.<sup>10</sup> Aside from which,—

<sup>1</sup> Page v. Estes, 19 Pick. 269.

<sup>2</sup> Delafield v. Brady, 108 N. Y. 524.

<sup>3</sup> Ante, § 1140-1148.

<sup>4</sup> Lewis v. Lee, 3 B. & C. 291; Ellah v. Leigh, 5 T. R. 679.

<sup>5</sup> Vol. I. § 153, note; ante, § 471.

<sup>6</sup> 20 & 21 Vict. c. 85, § 26.

<sup>7</sup> Bonneau v. Poydras, 2 Rob. La. 1.

<sup>8</sup> Dean v. Richmond, 5 Pick. 461;

Pierce v. Burnham, 4 Met. 303, 305;

Wheeler v. Wheeler, 2 Dane Abr. 310;

Lefevre v. Murdock, Wright, 205; Howard v. Howard, 15 Mass. 196; Clark v. Clark, 6 Watts & S. 85; Barber v. Barber, 21 How. U. S. 582; Taylor v. Simpson, 5 J. J. Mar. 639. And see Benadum v. Pratt, 1 Ohio St. 403.

<sup>9</sup> Burr v. Burr, 10 Paige, 166; Clark v. Clark, 6 Watts & S. 85; Barber v. Barber, 1 Chand. 280.

<sup>10</sup> Ante, § 114, 116 and note; Barber v. Barber, 21 How. U. S. 582.

§ 1687. *Effect on Wife's Domicil:—*

**Capacity.**—This divorce, by taking from the wife the duty to follow and dwell with her husband,<sup>1</sup> leaves her no longer under the rule that his domicil is hers. Therefore she has the capacity to acquire a new one of her own.<sup>2</sup>

§ 1688. *After Alimony without Divorce:—*

**Power to sue.**—Though a decree for alimony without divorce is in its consequences far short even of the ecclesiastical separation from bed and board,<sup>3</sup> the wife who had such decree was permitted to maintain her suit in the one case we have upon the question. The husband, being ordered to give security for the alimony, refused, and was committed to the custody of the sheriff for the contempt. This officer permitting him to escape, was adjudged liable to her in an action in her own name by next friend. To the objection of her coverture, Smith, J., replied: "If that argument were to prevail, there would be a failure of justice, which our law abhors; as there would be no means of enforcing a decree of a wife against her husband for alimony. The Court of Equity could order a refractory husband to be attached, and the sheriff would let him go if he thought proper; then, if the wife could not sue by her next friend, who could? The law provides no other course. And upon this occasion I would adopt the course of a very learned judge,—'If there is no precedent, I will make one.'"<sup>4</sup>

§ 1689. *Other Questions:—*

**Administration.**—The general law of husband and wife entitles him, as of right, to administer on her effects after her decease.<sup>5</sup> This divorce does not take away the right, and he may claim it though his guilt led thereto.<sup>6</sup> But the wife has not the like absolute right of administration after the husband's death;<sup>7</sup> and

<sup>1</sup> Vol. I. § 1714, 1715; ante, § 112.

<sup>2</sup> *Williams v. Dormer*, 16 Jur. 366, 9 Eng. L. & Eq. 598, 2 Rob. Ec. 505; *Barber v. Barber*, 21 How. U. S. 582; *Williamsport v. Eldred*, 84 Pa. 429.

<sup>3</sup> Vol. I. § 1393, 1400, 1417.

<sup>4</sup> *Prather v. Clarke*, 1 Tread. 453, 454.

<sup>5</sup> *Humphrey v. Bullen*, 1 Atk. 458; *Sands's Case*, 3 Salk. 22; *McCosker v. Golden*, 1 Bradf. 64; *Elliott v. Gurr*, 2 Phillim. 16, 1 Eng. Ec. 166, *Browning v. Reane*, 2 Phillim. 69, 1 Eng. Ec. 190, *Steadman v. Powell*, 1 Add. Ec. 58, 74, 2

Eng. Ec. 26, 34; *Wilkinson v. Gordon*, 2 Add. Ec. 152, 2 Eng. Ec. 257; 1 *Williams on Ex.* 242; *Toller on Ex.* 83.

<sup>6</sup> *Clark v. Clark*, 6 Watts & S. 85.

<sup>7</sup> *Sands's Case*, supra; *Dew v. Clark*, 1 Hag. Ec. 311; *Conyers v. Kitson*, 3 Hag. Ec. 556, 5 Eng. Ec. 202; In the Goods of *Williams*, 3 Hag. Ec. 217, 5 Eng. Ec. 82; *Spratt v. Harris*, 4 Hag. Ec. 405; *Stretch v. Pynn*, 1 Lee, 30, 5 Eng. Ec. 296; *Atkinson v. Barnard*, 2 Phillim. 316, 1 Eng. Ec. 271; *Webb v. Needham*, 1 Add. Ec. 494, 2 Eng. Ec. 189.

it is a proper exercise of the judicial discretion to refuse her, in favor of his son, if the divorce was for her adultery.<sup>1</sup>

§ 1690. **Legitimacy of Children.** — Contrary to the presumption from a mere non-judicial separation,<sup>2</sup> parties divorced from bed and board are presumed to live conformably to the sentence. So that if children are then born of the wife, they are *prima facie* illegitimate.<sup>3</sup>

§ 1691. **The Wife's Separate Property-interests** — are not taken away by this divorce;<sup>4</sup> as, if the husband has covenanted in a deed of separation to pay a third person an annuity for her use, this divorce will not release him.<sup>5</sup> Still, —

§ 1692. **Misconducting Herself.** — In proper circumstances wherein the wife was misconducting, and without particular reference to divorce, “a husband,” said Wilde, J., “would be entitled to come into a court of equity to restrain the trustees of his wife from proceeding at law for her separate maintenance, or where the court would refuse her relief on a bill to enforce a trust therefor. But to justify the court thus to interfere, the misconduct of the wife must be clearly proved; such, as that she had been guilty of adultery or criminal conversation, or had left her husband without any cause whatever.”<sup>6</sup>

§ 1693. **Convey Lands.** — This divorce does not give the wife capacity to convey her lands without the husband's joining in the deed.<sup>7</sup>

§ 1694. **Witness.** — It does not make the wife a competent witness against the husband where she was not such before.<sup>8</sup>

### § 1695. *The Doctrine of this Chapter restated.*

The divorce from bed and board leaves the marriage bond in full effect. Neither party can enter into another marriage.

<sup>1</sup> In the Goods of Davies, 2 Curt. Ec. 628, 7 Eng. Ec. 233. And see, as to this, In the Goods of Ihler, Law Rep. 3 P. & M. 50.

<sup>2</sup> Vol. I. § 1167-1174.

<sup>3</sup> St. George v. St. Margaret, 1 Salk. 123; Van Aernam v. Van Aernam, 1 Barb. Ch. 375.

<sup>4</sup> Ante, § 1672; Ireland v. Ireland, 84 N. Y. 321; Castlebury v. Maynard, 95 N. C. 281.

<sup>5</sup> Jee v. Thurlow, 2 B. & C. 547, 4 D. &

R. 11; Dr. Lushington, in Cood v. Cood, 1 Curt. Ec. 755, 763, 6 Eng. Ec. 452, 456. And see Brown v. Brown, 2 Md. Ch. 316.

<sup>6</sup> Ayer v. Ayer, 16 Pick. 327, 332; Moore v. Moore, 1 Atk. 272; Lee v. Lee, 1 Dick. 321, 2 Dick. 806. See ante, § 1660; Cartwright v. Cartwright, 19 Eng. L. & Eq. 46.

<sup>7</sup> Ellison v. Mobile, 53 Ala. 558.

<sup>8</sup> Kemp v. Downham, 5 Harring. Del. 417.

Most of the disabilities of coverture still adhere to the wife. But she can now sue and be sued, and she can acquire a domicile apart from her husband. Unless a statute forbids, he can still recover at law her *choses in action*, but equity will interpose and generally permit her to take all. It does not defeat either dower or curtesy. And the remaining consequences are analogous to these. The statutes of some of the States more or less modify these rules of our unwritten law.



## ADDITIONAL FORMS.

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§ 1696. **Already**,—interspersed with the text, are given most of the forms deemed desirable. But—

§ 1697. **In this Place**,—a few forms will be added, together with some suggestions for their use.

§ 1698. **The Ordinary Practice**—of the particular tribunal is supposed to be known by those to whom these forms are submitted. So each practitioner will, and should, modify the several forms taken from this work to accord with such practice. Especially—

§ 1699. **The Title of the Court, of the Cause, and the Address**—should conform to the usual course in the particular State and tribunal. The better to secure which, and to save space, they are generally omitted from the present collection.

§ 1700. *The Record, in Substance comprehending an Omnibus Collection of Forms*:—

The following, except the parts in brackets, is a copy from a Massachusetts record, made by the clerk. The libel with which it opens<sup>1</sup> was drawn by the present writer many years ago while in practice. The rest is in the terms common in such cases in the same court; not in any part, as in some of the other States, framed by counsel, but altogether by the clerk of the court. Of course, in such cases, as in all others, the clerk is supposed to proceed under the personal supervision of the judges, and sometimes he does so in fact.

### COMMONWEALTH OF MASSACHUSETTS.

ss.:

At the Supreme Judicial Court of the Commonwealth of Massachusetts,  
 begun and holden at \_\_\_\_\_, within and for the County of \_\_\_\_\_,  
 on the second Tuesday of \_\_\_\_\_, being the \_\_\_\_\_ day of said month,  
 Anno Domini, \_\_\_\_\_.

S. R., of \_\_\_\_\_, in the County of \_\_\_\_\_, wife of D. R., of \_\_\_\_\_, in  
 said county, yeoman, libels and gives this court to be informed that  
 her maiden name was S. W., and that by said name she was married

<sup>1</sup> Ante, § 1524.

to said D. at \_\_\_\_\_, in said county, on the fourth day of \_\_\_\_\_, in the year eighteen hundred and \_\_\_\_\_; <sup>1</sup> that she lived and cohabited with her said husband at various places in this Commonwealth, until, being informed of his adultery hereinafter set forth, and in consequence thereof, she abandoned him. [This jurisdictional allegation <sup>2</sup> was under the statutes sufficient where, as in this case, the marriage was and was averred to be in Massachusetts. If the marriage was in another State, charge it so, and *add*: and that afterward, on the fourth day of June, in the year \_\_\_\_\_, she removed into Massachusetts, and from that day to the day of the filing of this libel, being more than five consecutive years next preceding said filing, she has resided and continues to reside in this State.] That the said D., at divers and many times and places since the said marriage, has committed adultery with divers and many lewd women, the names of some of whom are known to your libellant, and others are unknown; that among these instances of adultery, some seven or eight years ago, said libellant alleges on the first day of July, in the year eighteen hundred and forty-four, and at various times before and since said day, at \_\_\_\_\_, in the County of \_\_\_\_\_, he committed adultery with one A. B. That on a date unknown to said libellant, and on divers days during the last six years; at said \_\_\_\_\_, he committed adultery with one C. D. That on the fourth day of July last past, at said \_\_\_\_\_, he committed adultery in a house of ill-fame kept by a Mrs. P., with a lewd woman whose name is unknown to said libellant.<sup>3</sup> And that during all the time of their cohabitation he treated said libellant with great unkindness and cruelty.<sup>4</sup> [In this case, there were no children. If there were such, a mention of them in the libel, for which this would be a convenient place, would be proper,<sup>5</sup> whether we should deem it necessary as a foundation for orders concerning them,<sup>6</sup> or not. Here the husband's faculties likewise may be alleged,<sup>7</sup> if such is the practice of the court.<sup>8</sup>] Wherefore said libellant prays that said D.

<sup>1</sup> Other forms for alleging the marriage appear ante, § 576, 578, 579, 605, 1235, 1253, 1278.

<sup>2</sup> Ante, § 589-595.

<sup>3</sup> As to the manner of charging adultery, with other forms, see ante, § 1324-1348.

<sup>4</sup> I cannot say much in vindication of this averment for a case wherein cruelty is not in fact one of the grounds for the prayer. Where the divorce is meant to be founded, even in part, upon it, the facts should be more fully stated.

<sup>5</sup> Ante, § 576, 578.

<sup>6</sup> Ante, § 1179 et seq.

<sup>7</sup> Ante, § 578.

<sup>8</sup> I cannot create practice. I can only state what, in fact, so much as I can learn of it is. As already explained (ante, § 1067-1078), I deem it the better practice to make no mention in the libel either of the faculties or of alimony, but to let this branch of the proceeding be strictly ancillary. And in my opinion also, it is both abstractly and practically best to apply the same rule to what concerns the custody and support of children. Ante, § 1206. But in a court wherein these questions are not settled, counsel may prefer circumspection and caution to a

may be duly cited to answer to this libel, that he may be required to pay into court for her use such sum as the court may judge reasonable to enable her to prosecute the same, that the bonds of matrimony between her and her husband may be dissolved, that she may be invested with title to such property as is in her possession, that reasonable alimony may be decreed to her, that she may be permitted to resume her aforesaid maiden name of S. W., and for such other and further decree as to this court may seem just. This libel was filed in the office of the clerk of the Supreme Judicial Court on the thirtieth day of March last, and a summons was thereupon issued, directed to the sheriff of said County of \_\_\_\_\_, or his deputy, commanding him to summon the said D. R. to appear in this present term to answer to the libel aforesaid. And now the libellant appears and enters her said libel, and the said D. R., having been duly summoned, also appears. [Following the loose practice mentioned in a preceding chapter,<sup>1</sup> the record at this the proper place has no mention of pleadings subsequent to the libel, for there were none. But where there are such, they should be set out in the record according to the usual course for records of like steps in the same court. An English form for the divorce record has the following: "D. R. did, in answer thereto, deny, &c. *Insert the denial and any other necessary matters contained in the answer.* Whereupon the said S. R. denied that, &c. *Here insert the substance of the Replication, if any, and so on for the further statements, if any.* Therefore let a jury come, &c." In this Massachusetts record, nothing is said of the jury, for the reason that the trial was by the court.] And the evidence in support of the libel produced being seen and understood by the court, the material facts alleged to sustain the charge set forth in said libel are satisfactorily proved. It is therefore decreed by the court here, that the bonds of matrimony heretofore entered into between the said S. R. and the said D. R. for the causes set forth in said libel, be, and hereby are, dissolved, of which all persons interested and concerned are to take notice, and govern themselves accordingly. And it is further decreed by the court here, that the said S. R. have and hold all the personal property in her possession. And also, that she may resume her maiden name of S. W.

§ 1701. *Some of the Particulars : —*

**The Libel,**—petition, complaint, or bill, by whatever name called, appears sufficiently in the last and preceding sections.<sup>2</sup>

following of these hints. For I do not understand that a short mention of children, alimony, and suit-money in the libel will cut off the right to the fuller ancillary allegations.

<sup>1</sup> Ante, § 643-645.

<sup>2</sup> Ante, § 576, 578, 579, 1700.

§ 1702. **The Allegation of Marriage** — has been presented in a great variety of slightly differing forms.<sup>1</sup>

§ 1703. **The Jurisdictional Allegations**, — though necessarily varying with the statutes of the State, have been sufficiently explained,<sup>2</sup> with forms that can be adapted to any statutory terms.<sup>3</sup>

§ 1704. **The Allegation of the Offence**, — or the ground of nullity, has been given for insanity,<sup>4</sup> fraud,<sup>5</sup> duress,<sup>6</sup> impotence,<sup>7</sup> adultery,<sup>8</sup> cruelty,<sup>9</sup> and desertion.<sup>10</sup>

§ 1705. **The Allegation of Drunkenness** — should cover the terms of the statute, and conform to the principles stated in a preceding place.<sup>11</sup> The statute varies in our States. The following is a form now lying before the author, — good, if the legislative expression is the same: —

That the respondent, on, &c., at, &c., became, and has ever since continued to be, grossly and habitually intemperate.

§ 1706. **Children**. — Enough of the allegation about them has already been given.<sup>12</sup>

§ 1707. **The Petition for Alimony**, — or allegation of faculties, with an answer thereto, has been given in an English form,<sup>13</sup> easily adapted to American use.

§ 1708. **The Demurrer**, — with the **Joinder therein**, — familiar to every practitioner, should follow the ordinary course in the particular court.<sup>14</sup> A note hereto refers to a divorce case wherein these forms appear.<sup>15</sup>

§ 1709. **The Answer** <sup>16</sup> — has already been given in an English form.<sup>17</sup> Some American forms copied from the reports, yet perhaps admitting of improvements as well as adaptations, are —

*In Denial.* — And the said Alexander Orrok comes and defends, &c., when, &c., and says the allegations, matters, and things in the libel contained are false and groundless, and that there is not any cause of divorce as prayed for; and thereof he puts himself on trial,

<sup>1</sup> Ante, § 576, 578, 579, 605, 1235, 1253, 1278, 1700.

<sup>2</sup> Ante, § 589-595.

<sup>3</sup> Ante, § 1700.

<sup>4</sup> Ante, § 1235.

<sup>5</sup> Ante, § 1253.

<sup>6</sup> Vol. I. § 544, note; ante, § 1260.

<sup>7</sup> Ante, § 1278-1280.

<sup>8</sup> Ante, § 576, 578, 1700.

<sup>9</sup> Ante, § 1434-1436.

<sup>10</sup> Ante, § 579, 1463, 1464.

<sup>11</sup> Ante, § 1503.

<sup>12</sup> Ante, § 576, 578, 1700 and note.

<sup>13</sup> Ante, § 1072, 1073.

<sup>14</sup> Ante, § 647.

<sup>15</sup> *Chichester v. Mure*, 3 Swab. & T. 223. For **Bill, Demurrer, Answer, &c.** — see *McDermott's Appeal*, 8 Watts & S. 251.

<sup>16</sup> Ante, § 644, 648.

<sup>17</sup> Ante, § 577.

&c.<sup>1</sup> [The trial was here by the court. If it had been by jury, the expression would have been "puts himself on the country."]

*Plea of Condonation.* — And the said Abel Jeans, by, &c., comes and defends, &c., and says *actio non*, &c., because he says that the said Priscilla Jeans has admitted the said Abel Jeans into conjugal society or embraces, after she the said Priscilla knew of the said acts of adultery. Wherefore the said Abel Jeans prays judgment, &c., whether the said Priscilla ought to have and maintain her suit aforesaid, thereof against him, &c.<sup>2</sup>

§ 1710. **Adultery in Recrimination.** — The following was in the case cited thereto adjudged adequate : —

That the complainant, on divers days during the months of June, July, August, September, and October, during the years 1844, 1845, 1846, and between the first day of June and the first day of November in the years aforesaid, at Fort Lee, Bull's Ferry, and Weehawken, in the State of New Jersey, did repeatedly commit adultery with some female to defendant unknown; and more particularly, that the said complainant did, during the year 1846, commit adultery with the said female at a hotel at Fort Lee aforesaid.<sup>3</sup>

§ 1711. **The Plea, Replication, and Joinder in issue** — appear together in one case as follows : —

The respondent in his plea, protesting against the truth of the several allegations contained in the libel, says that the said Mary hath, at divers times before the filing of her said libel, committed the crime of adultery with one M. Luyo, and with divers other persons,<sup>4</sup> and therefore he prays that the prayer thereof may not be granted.

And the libellant, for replication, says that all the allegations contained in said libel are true, and that by reason of anything above in the answer of the said John contained, she ought not to be precluded from having the prayer of her said libel granted; because she says that all the several allegations in the said answer contained are false and groundless, and that she is in no wise guilty in manner and form as the said John in his said answer hath alleged; and this she prays may be inquired of by the court.

And the said John likewise.<sup>5</sup>

<sup>1</sup> Orrok v. Orrok, 1 Mass. 341.

<sup>2</sup> Jeans v. Jeans, 2 Harring. Del 38.

<sup>3</sup> Morrell v. Morrell, 1 Barb. 318.

Practically I should not allege the adultery in this way, but after the forms ap-

proved when it is the ground for divorce. Ante, § 1324-1348, 1700.

<sup>4</sup> Too general, unless there is to be a bill of the particulars. And see the last note.

<sup>5</sup> Pastoret v. Pastoret, 6 Mass. 276.

§ 1712. *The Divorce Decree* :—

**General.**—We have seen that the final decree for divorce is a part of the record of the cause.<sup>1</sup> Its main differences are three, distinguishing the sort of divorce. Thus,—

§ 1713. **Nullity.**—The following form of the nullity decree was many years ago prepared by the Hon. Richard Fletcher, while a judge of the Supreme Judicial Court of Massachusetts, for use in a cause then before him. By his kind permission, it was inserted in the author's "Marriage and Divorce."

And now the said parties appearing, the said A by M, his attorney and counsel, and the said X, otherwise called Y, by N, her guardian *ad litem* appointed by the court; and the court here, having fully heard the said parties, and having fully heard and considered their several pleas, proofs, and allegations, doth pronounce, decree, and declare that on the twenty-second day of August, in the year of our Lord one thousand eight hundred and forty-seven, a pretended marriage was had and solemnized between the said A and the said X, otherwise called Y,<sup>2</sup> but that at the time of the solemnization of the said pretended marriage, she the said X, otherwise called Y, was an insane person and incapable of making such a contract. Therefore, upon the reason above mentioned, the said court here doth hereby pronounce, decree, and declare that the said pretended marriage so had and solemnized between the said A and the said X, otherwise called Y, was and is wholly and absolutely null and void, to all intents and purposes whatsoever. And the said court here doth hereby further pronounce, decree, and declare that the said A was and is free from all bond of marriage with the said X, otherwise called Y.<sup>3</sup>

§ 1714. **Dissolution of Valid Marriage.**—A sufficient form for the decree is included in the record above copied.<sup>4</sup>

§ 1715. **Divorce from Bed and Board — (Custody of Children — Alimony).**—The following is the form of decree for the divorce from bed and board, the custody of the children, and for alimony, in a case carefully considered by the late Chancellor Kent. Departures in it from the more common forms are explained in a preceding section :<sup>5</sup>—

<sup>1</sup> Ante, § 1524.

<sup>2</sup> As to this part of the decree, see ante, § 1527.

<sup>3</sup> For other forms of the nullity decree, see Vol. I. § 544, note; Fielding's Case, 14 How. St. Tr. 1327, 1369.

<sup>4</sup> Another form, the cause of divorce being adultery and cruelty, appears in *McCaulley v. McCaulley*, 1 Harring. Del. 137. Another, for cruelty, in *Hackney v. Hackney*, 9 Humph. Tenn. 450.

<sup>5</sup> Ante, § 476.

It appearing from the pleadings and proofs that the defendant has been guilty of cruel and inhuman treatment of the plaintiff, by repeated acts of personal violence, so as to render it unsafe and improper under existing circumstances for her to cohabit with him, or to be under his dominion and control, it is thereupon *ordered*, &c., that the plaintiff and defendant be separated from bed and board forever; provided, however, that the parties may at any time hereafter, by their joint and mutually free voluntary act, apply to the court for leave to be discharged from this decretal order. And it is hereby declared to be the duty of each of them to live chastely during their separation, and that it will be criminal, and an act void in law, for either of them during the life of the other to contract matrimony with any other person.<sup>1</sup> And it is further *ordered*, &c., that the plaintiff, according to the prayer of her bill, be entitled to and charged with the custody, care, and education of the infant son of the parties in the pleadings mentioned; provided always, that this order for the custody, care, and education of the said infant may at any time hereafter be modified, varied, or annulled upon sufficient cause shown. And it is further *ordered*, &c., that the defendant pay to the plaintiff two hundred dollars a year, to be computed from the date of this decree, in half-yearly payments, to be applied towards the support and maintenance of the plaintiff and her son,<sup>2</sup> and that this allowance is to continue until further order, and be subject to variation as future circumstances may require. And it is further *ordered*, that the defendant pay to the plaintiff the costs of this suit, to be taxed, and that she have execution therefor, according to the course and practice of the court.<sup>3</sup>

§ 1716. **Custody of Children — Permanent Alimony.** — These decrees are included in the form just given. Other forms may be found in the reports.<sup>4</sup>

<sup>1</sup> See ante, § 1675. Whether or not this clause is wise, it follows prior precedents, and it is not within the observations at ante, § 1523.

<sup>2</sup> It is the better practice to put this matter into separate orders, — one for alimony to the wife, the other for money to be paid her for the support of the children. Then the support-money can be dropped out at the proper time without

changing the rest of the decree. Ante, § 1020, 1213.

<sup>3</sup> *Barrere v. Barrere*, 4 Johns. Ch. 187, 198. There is another form of the decree for the bed-and-board divorce in *Tayman v. Tayman*, 2 Md. Ch. 393.

<sup>4</sup> For example, there is a form, apparently more prolix than necessary, in *Richmond v. Richmond*, 1 Green Ch. 90. For alimony alone, *Hewitt v. Hewitt*, 1 Bland, 101.





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THE ITALIC LINES — are directions to the body of the book where, commonly in the section-heads, appear the sort of particulars given in the other index-lines.

NOTE. — This use of *italic lines* in connection with the *section-heads* renders the index more compact, therefore more convenient, and the labor of turning to the body of the book is many times compensated by the greater help to the search thus afforded.

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